

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division**

DUSTIN WHITMORE, *on behalf of* )  
*himself and all those similarly* )  
*situated,* )  
Plaintiff, )  
v. )  
JOSEPH WALTERS, *in his official* )  
*capacity as Director of the Virginia* )  
*Department of Corrections,* )  
Defendant.

**Defendant.**

## **INTRODUCTION**

1. This case challenges the illegal and unconstitutional over-detention of people incarcerated in the custody of the Virginia Department of Corrections (“VDOC”) and to whom VDOC denied earned sentence credits in violation of the statutory mandate and intent of Virginia’s earned sentence credit program (the “Program”), codified at Virginia Code § 53.1-202.2 *et seq.*

2. The Program entitles people convicted of felonies and sentenced to more than one year of incarceration to earn an earlier release through good behavior and participation in programs and employment.

3. Pursuant to the unambiguous text of the operative statute, people who are eligible to earn sentence credits should begin accruing them upon incarceration following the entry of a final order of conviction. However, contrary to the clear statutory language, VDOC has established an arbitrary policy by which people otherwise eligible for the Program are unable to earn sentence credits at the full rate until their “custody responsibility date” (“CRD”). This date

appears nowhere in the statute, is undefined in the Virginia Code, and bears no relation to the sentencing date or physical location of the incarcerated person. And, in violation of the statutory mandate for Program eligibility, it can be anywhere from days to months later than the date on which the incarcerated person has become eligible to earn sentence credits under the statute.

4. This arbitrary practice denies eligible people the benefit of sentence credits to which they are statutorily entitled and has resulted in the unconstitutional confinement of hundreds of Virginians for weeks or months after they should have been released to reunite with their loved ones and begin reintegrating into society.

5. Plaintiff Dustin Whitmore has been convicted of a felony and sentenced to a term of incarceration. He has been incarcerated in the Northwestern Regional Adult Detention Center in Winchester, Virginia, since the entry of his final order of conviction. Although he is eligible to earn sentence credits under the Program, because VDOC has not yet set his CRD, he is not yet earning those credits. Plaintiff Whitmore therefore seeks declaratory and injunctive relief on behalf of himself and others similarly situated, establishing their right to earn sentence credits as of the date of their incarceration following the entry of a final order of conviction, as provided by statute.

#### **JURISDICTION AND VENUE**

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3) because the action seeks to remedy violations of the Fourteenth Amendment under 42 U.S.C. § 1983 and 28 U.S.C. § 2201.

7. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) because the Defendant resides in Richmond, Virginia.

## PARTIES

8. Plaintiff Dustin Whitmore is currently incarcerated at the Northwestern Regional Adult Detention Center in Winchester, Virginia, after being convicted of a felony and sentenced to a term of incarceration for more than one year, making him eligible for the Program. Defendant has not yet begun awarding Mr. Whitmore earned sentence credits, despite his statutory eligibility.

9. Defendant Joseph Walters is the Director of VDOC and is named in his official capacity. Director Walters is ultimately responsible for all of VDOC's policies and procedures, including those related to the Program. Defendant Walters makes final, agency-wide decisions on how to administer the statutorily mandated Program.

## FACTS

10. Virginia law creates an earned sentence credit program whereby people in VDOC custody are eligible for sentence credits for good behavior and program participation while in custody. The statute defines "Eligibility for earned sentence credits" as follows:

Every person who is convicted of a felony offense committed on or after January 1, 1995, and who is sentenced to serve a term of incarceration in a state or local correctional facility shall be eligible to earn sentence credits . . . . **Such eligibility shall commence upon the person's incarceration in any correctional facility following entry of a final order of conviction by the committing court.** . . . . 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) (emphasis added).

11. The language of the statute is mandatory; persons who meet the statutory criteria "shall be eligible" for credits, and their eligibility "shall commence" on the statutorily prescribed date.<sup>1</sup>

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<sup>1</sup> The phrase "any correctional facility" in § 53.1-202.2(A) encompasses both state facilities and local or regional jails. "State correctional facility" is defined as "any correctional center or correctional field unit used for the incarceration of adult offenders established and operated by the Department of Corrections, or operated pursuant to the Corrections Private Services Act

12. Prior to July 1, 2022, people in VDOC custody could earn a maximum of 4.5 sentence credits for every 30 days served. Va. Code Ann. § 53.1-202.3 (effective until July 1, 2022). In 2020, Virginia’s General Assembly amended the earned sentence credit program to expand the number of credits that could be earned towards many sentences. 2020 Va. Acts Spec. Sess. I, chs. 50, 52. That law took effect on July 1, 2022.

13. The General Assembly provided that the expanded sentence credits “shall apply retroactively” to a person’s “entire sentence.” 2020 Va. Acts Spec. Sess. I, chs. 50, 52.

14. Sentences for convictions that are explicitly exempted from the new system by the statute are referred to internally by VDOC as “ESC-1” sentences. Sentences for all other convictions which are not specifically excluded from the new program, and are therefore eligible for expanded credits, are “ESC-2” sentences. This case is only about VDOC’s execution of ESC-2 sentences; ESC-1 sentences are not at issue.

15. The General Assembly has provided that for ESC-2 sentences, “sentence credits *shall be awarded and calculated*” using a specified classification system. Va. Code Ann. § 53.1-202.3(B) (emphasis added).

16. The mandatory language for when ESC-2 credits must begin to be awarded, Va. Code Ann. § 53.1-202.2(A), and the mandatory language for how they must be calculated, Va. Code Ann. § 53.2-202.3(B), leave VDOC no discretion over when to begin awarding earned sentence credits on ESC-2 sentences or how many credits to award.

17. Section 53.1-202.3(B) establishes a four-level classification system for people

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(§ 53.1-261 et seq.).” Va. Code Ann. § 53.1-1. “Local correctional facility” is defined as “any jail, jail farm or other place used for the detention or incarceration of adult offenders, excluding a lock-up, which is owned, maintained, or operated by any political subdivision or combination of political subdivisions of the Commonwealth.” Va. Code Ann. § 53.1-1.

serving ESC-2 sentences in any correctional facility. Individuals are assigned to a level based on their participation in assigned programming and number of disciplinary infractions. At Level I, people earn 15 sentence credits for every 30 days served; at Level II, people earn 7.5 days for every 30 days served; at Level III, people earn 3.5 days per 30 days served; and at Level IV, people do not earn any sentence credits. *See* Va. Code Ann. § 53.1-202.3(B).

18. VDOC has adopted operating procedures that set out the Department's policies and procedures to implement the Program.<sup>2</sup>

19. Under those operating procedures, people serving ESC-2 sentences do not begin to earn sentence credits at the rates established in § 53.1-202.3(B) until their "custody responsibility date" ("CRD"), at which point VDOC deems them to be "classified" and automatically assigns them to Class Level 1, allowing them to earn the maximum possible number of sentence credits under the Program. OP830.3 at 14. Between their incarceration following conviction and their CRD, the operating procedures consider people to be "unclassified inmates."

20. The statutes establishing the Program do not use or define the terms "custody responsibility date" or "unclassified inmate." Neither statute nor policy explains how VDOC determines a person's CRD. In practice, it appears that the CRD is the date on which VDOC's Court and Legal Office calculates the length of a person's sentence and their projected release date.<sup>3</sup>

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<sup>2</sup> Operating Procedure 830.3, "Good Time Awards," July 1, 2022, amended April 17, 2025 (hereinafter "OP830.3"), available at <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-3.pdf>; Operating Procedure 830.4, "Good Time Awards for State Inmates in Local Jails," July 1, 2022, amended July 1, 2024 (hereinafter "OP830.4"), available at <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-4.pdf>.

<sup>3</sup> Although the exact procedures by which VDOC's Court and Legal section calculates each prisoner's projected good time release date ("GTRD") are not public, in general, the GTRD is calculated by taking the total active sentence imposed by the court, subtracting any jail credits (including time served prior to the CRD and any good time credits earned while in the jail), and

21. VDOC operating procedures make clear that people serving felony sentences in either a local or regional jail or a VDOC facility are classified as Class Level 1 as of their CRD and thereby begin to earn full sentence credits under the Program. OP830.3 at 3; OP830.4 at 7.

22. Despite being statutorily mandated by Va. Code Ann. §§ 531-202.2(A) and 53.1-202.3(B) to award sentence credits for ESC-2 sentences beginning on the date of incarceration after entry of a final order of conviction, VDOC's operating procedure provides that between that date and one's CRD, unclassified individuals may earn sentence credits only "at the rate of ... 2.25 days for each 30 days served on sentences under ESC-1 and ESC-2." OP830.3 at 14; *see also* OP830.4 at 7-8.

23. The statutes establishing the Program do not authorize a different rate at which sentence credits may be earned prior to "classification" by VDOC. This is an invention of VDOC, imposed arbitrarily and in violation of the statute.

24. Thus, VDOC does not allocate full earned sentence credits to people who have been convicted, sentenced, and incarcerated, and are therefore eligible to earn full sentence credits, until VDOC sets their CRD. If VDOC properly calculated the date on which ESC eligibility begins, people would have an opportunity to earn more credits over their term of incarceration, as the legislature commanded.<sup>4</sup>

25. VDOC's policy of failing to award earned sentence credits at the statutorily mandated rates after an individual becomes eligible for them often results in the over-detention

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then subtracting the maximum number of sentence credits that may be earned on the difference. From that date, 28-30 adjusted discharge days are then subtracted, resulting in the GTRD.

<sup>4</sup> Earned sentence credits may be forfeited as a penalty for disciplinary infractions, VDOC Operating Procedure 861.1 at 28, or may be earned at lower rates based on one's class level, *supra*. Thus, although the number of credits that a person may earn is established by statute, the number of credits that people actually earn over the course of their sentence is not guaranteed but rather depends on their conduct.

of individuals—sometimes for months—because they have been denied sentence credits that they earned and are entitled to.

26. Defendant is responsible for implementing the Program pursuant to the unambiguous language of Va. Code Ann. §§ 53.1-202.2(A) and 53.1-202.3(B). Instead of carrying out these responsibilities, Defendant has implemented the Program in a way that is contrary to the statutes' plain language, continuing the practices of his predecessor.

27. Defendant knows and has known that his implementation of the Program created a risk that people in VDOC custody would be over-detained, and Defendant recklessly disregarded that risk.

28. Since the expansion of the Program, numerous incarcerated individuals and their loved ones have submitted complaints, grievances,<sup>5</sup> and letters, and made phone calls to the Court and Legal office raising this issue.

29. For example, on July 11, 2023, one individual wrote a letter to Court and Legal asserting that he was entitled to have earned 15 sentence credits for every 30 days served, instead of the 2.25 credits that he earned up until his CRD. Court and Legal responded that while he was currently earning 15 days for every 30 served, he was only entitled to earn 2.25 days until his CRD.

30. In March, 2024, an individual serving an ESC-2 eligible sentence at the Alexandria City Jail made multiple inquiries to Court and Legal questioning whether he had received all the sentence credits to which he was entitled. Court and Legal responded only with a letter stating

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<sup>5</sup> VDOC considers complaints regarding the calculation of sentences to be “non-grieveable,” rejects grievances that relate to the calculation of sentences, and instructs individuals to write to Court and Legal. While at some facilities, a specific request form to write to Court and Legal may be available, Court and Legal has not established any formal complaint or investigation mechanism or pathway to appeal a decision or response to a written inquiry.

that his projected release date “accurately reflects all applicable jail credits, to include Adjusted Discharge Days, class level assignment, good time previously earned and good time projected to be earned at the current class level as outlined in Operating Procedure 830.3, Good Time Awards.”

31. On May 18, 2024, an individual incarcerated at Haynesville Correctional Unit wrote a letter to then-VDOC Director Chadwick Dotson and Court and Legal requesting that he receive earned sentence credits from the date of his incarceration following the entry of a final order of conviction, rather than his CRD, pointing to the mandatory language of Va. Code Ann. § 53.1-202.2. He also filed a petition for Writ of Habeas Corpus in the Supreme Court of Virginia on May 20, 2024, raising this issue. That petition was dismissed without a resolution on the merits.

32. In August 2024, an individual held at Riverside Regional Jail who was eligible for ESC-2 credits, but for whom VDOC had yet to set a CRD, repeatedly contacted the Court and Legal office himself and through his fiancée, to request that Court and Legal begin awarding him sentence credits as of the date of his incarceration following the entry of a final order of conviction. VDOC failed to do so and began awarding him sentence credits only as of his CRD.

33. In January 2025, an individual incarcerated at St. Brides Correctional Center submitted a written complaint through VDOC’s grievance process complaining that he should have begun earning sentence credits at a rate of 15 credits for every 30 days served as of the date of his sentencing. He did not receive a written response; instead, a counselor at the prison verbally advised him that this matter could not be addressed through the grievance process, and that he should write to Court and Legal. He then wrote a letter to Court and Legal setting out this complaint. He eventually received a response letter dated January 23, 2025, which concluded that his projected good time release date “accurately reflects all applicable jail credits, to include Adjusted Discharge Days, class level assignment, good time previously earned and good time

projected to be earned at the current class level . . . .”

34. Upon information and belief, from July 1, 2022 to the present, numerous other individuals have contacted Court and Legal complaining that they should be awarded ESC-2 credits prior to their CRD, because the General Assembly specified that such credits must be applied to a person’s “entire sentence.” *See supra* ¶ 13.

35. VDOC failed to take any action to remedy the violations of the rights of incarcerated people, including Plaintiff.

36. Defendant’s actions and failure to remedy the violations of Plaintiff’s rights are part of a pattern in which VDOC, because of a policy disagreement with the 2020 amendments to the Program, has repeatedly denied sentence credits to individuals in its custody who are entitled to such credits in clear violation of the plain text of the law.

37. This pattern began in the immediate aftermath of the passage of the 2020 amendments. After the passage of the amendments but before their effective date, Attorney General Mark R. Herring released an Opinion in response to questions from Harold Clarke, then-Director of VDOC, regarding the interpretation and application of Va. Code Ann. § 53.1-202.3(A). Va. Off. Att’y Gen. Op. No. 21-068 (Dec. 21, 2021), 2021 WL 6112902 at \*1. The Opinion primarily addressed which offenses were disqualified from earning expanded earned sentence credits, and concluded that certain offenses, including inchoate offenses, were not excluded from ESC-2 credits. Attorney General Herring concluded that most inchoate offenses were eligible for ESC-2 credits.

38. After a change in administration, including the election of a new Attorney General, VDOC took the extraordinary step of requesting from Attorney General Miyares a reconsideration of the exact same questions that Attorney General Herring had already answered. On April 13,

2022, Attorney General Miyares issued a new opinion, which differed from the Herring Opinion in significant parts, including reaching the opposite conclusion from the Herring Opinion on whether the inchoate offenses were eligible for ESC-2 credits. Va. Off. Att'y Gen. Op. No. 22-008 (Apr. 13, 2022), 2022 WL 1178995 at \*1. In a footnote, Attorney General Miyares noted that he had voted against the amendments to the Program while a member of the General Assembly. *Id.* at \*1 n.2.

39. In July 2023, the Supreme Court of Virginia held that one aspect of VDOC's interpretation of the statute—denying ESC-2 credits to individuals who were serving sentences for “attempted aggregated murder” even though that offense is not on the statutory list of offenses excluded from ESC-2 credits—was contrary to the plain language of the law. *See Prease v. Clarke*, 302 Va. 376, 383 (2023). The Court ordered Mr. Prease’s immediate release.

40. Responding to the decision, Virginia Attorney General Jason Miyares stated that he was “disappointed with the Supreme Court’s decision [in *Prease v. Clarke*], but it is the law and we will comply with it. The Democrats forced through this dangerous legislation in 2020.” “I will work with the Governor and the leaders of the General Assembly to fix this problem that the radical left created before it gets any worse.”<sup>6</sup>

41. Despite Attorney General Miyares’ assertion that the state would comply with the Virginia Supreme Court’s ruling in *Prease v. Clarke*, VDOC did not immediately award enhanced sentence credits to all others in its custody serving sentences for offenses not included in the statutory list of offenses ineligible for ESC-2 credits.

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<sup>6</sup> *Virginia Supreme Court Orders Release of Steven Prease, Who Challenged Earned Sentence Credit Rollback*, ABC 8News WRIC (Jul. 7, 2023), <https://www.wric.com/news/virginia-news/virginia-supreme-court-orders-release-of-steven-prease-who-challenged-earned-sentence-credit-rollback/>.

42. In November 2023, Leslie Puryear, an individual in VDOC custody who was being denied ESC-2 credits even though the offense for which he was incarcerated, attempted robbery, is also not on the statutory list of excluded offenses, filed a petition for a writ of habeas corpus with the Supreme Court of Virginia. After initially opposing the petition, VDOC eventually reversed course and gave Mr. Puryear and others serving sentences for similar offenses the ESC-2 credits to which they were statutorily entitled, recalculated their sentences, and released those who had already been over-detained. In a subsequent civil lawsuit, Mr. Puryear and 53 other similarly situated individuals recovered nearly \$1.6 million from VDOC as compensation for their over-detention resulting from VDOC's failure to properly award them the sentence credits they were statutorily entitled to.

43. Finally, on April 18, 2024, the Supreme Court of Virginia held that VDOC had again violated the plain text of the statute by denying ESC-2 credits to individuals serving sentences for inchoate versions of excluded offenses, because the plain language of the statute does not exclude those offenses from eligibility. *Vasquez v. Dotson*, 303 Va. 97, 104 (2024). As a result, the petitioner in that case was entitled to immediate release. Based on this holding, approximately forty other people were also immediately released from VDOC custody.

44. VDOC consistently chose unreasonable interpretations of the earned sentence credit statute even after the Supreme Court of Virginia made clear that the plain language of the statute controlled and was to be given effect.

45. This choice was deliberate and intentional and was made without regard to the rights of people in VDOC custody, because VDOC, like other members of the administration at the time, opposed the expansion of the earned sentence credit program and intended to roll back that expansion.

46. For example, former Governor Glenn Youngkin, explaining a provision he added to Virginia's state budget in 2022 that delayed the implementation of the program, stated: "Everyone knows that, in fact, the original bill wasn't meant to accelerate the release of folks who had committed violent crimes. So the bill had an error in the way it was written versus what was intended and what my amendment did was correct the error."<sup>7</sup> However, the General Assembly declined to include this provision in the 2024 budget bill, allowing the full program to take effect as originally passed.

47. Through a spokesperson, Youngkin also said that he "continues to express serious concerns about this program and its impact on victims and public safety across the Commonwealth."<sup>8</sup>

48. Former Attorney General Jason Miyares has made similar statements. In 2024, he issued a press release that described the expansion of the Program as "prioritiz[ing] sentence reduction over public safety, creating opportunities for violent recidivism and leaving victims and communities to bear the tragic consequences."<sup>9</sup>

49. During a press conference, Miyares stated, "We got rid of truth in sentencing for the early release of violent offenders: a criminal first, victim last mindset that hurts every

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<sup>7</sup> Jackie DeFusco, *550 Inmates Won't Be Released Early This Summer After Last-Minute Vote, VADOC Says*, ABC 8News WRIC (Jun. 27, 2022), <https://www.wric.com/news/virginia-news/550-inmates-wont-be-released-early-this-summer-after-last-minute-pivot/>.

<sup>8</sup> Charlotte Rene Woods, *Youngkin Wants to Walk Back Earned Sentence Credit Expansions in State Budget*, Virginia Mercury (Jan. 7, 2025), <https://virginiamercury.com/2025/01/07/youngkin-wants-to-walk-back-earned-sentence-credit-expansions-in-state-budget/>.

<sup>9</sup> Jason Miyares, *News Release: Attorney General Miyares, Violent Crime Victims Call on General Assembly to Fix Virginia's Broken Early Release Law*, Office of the Attorney General (Jul. 2, 2024), <https://www.oag.state.va.us/media-center/news-releases/2881-july-2-2025-attorney-general-miyares-violent-crime-victims-call-on-general-assembly-to-fix-virginias-broken-early-release-law>.

Virginian[].”<sup>10</sup>

**Plaintiff Dustin Whitmore**

50. Plaintiff Dustin Whitmore is currently incarcerated at the Northwestern Regional Adult Detention Center in Winchester, Virginia.

51. On June 11, 2019, Mr. Whitmore pled guilty to one count of shoplifting more than \$500, a felony under Va. Code Ann. § 18.2-103. He was sentenced to five years of incarceration with 4 years and 6 months suspended. He was also sentenced to a term of supervised probation upon release. He served his active sentence and was released to the community, where he remained on supervised probation.

52. He was arrested on or around June 7, 2025 in Maryland on a warrant for violating the terms of his probation and was held without bond.

53. On or around August 6, 2025, Mr. Whitmore waived extradition and was subsequently transported to Virginia on or around August 22, 2025, where he was housed at the Northwest Regional Adult Detention Center.

54. Mr. Whitmore was held without bond until December 5, 2025, when he was convicted of violating the terms of his probation and was sentenced to two years of incarceration. He is currently serving that sentence at the Northwest Regional Adult Detention Center.

55. Mr. Whitmore is eligible for ESC-2 credits under Va. Code Ann. § 53.1-202.3(B). Pursuant to Va. Code Ann. § 53.1-202.2(A), he should have begun earning those credits as of December 5, 2025.

56. However, he has not yet received a Legal Update Sheet, and his projected good

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<sup>10</sup> Attorney General Jason Miyares, *Part 1: AG Miyares, Crime Victims Urge General Assembly to Fix Virginia’s Broken Early Release Law*, YouTube, at 27:30-27:40 (Jul. 2, 2025), <https://www.youtube.com/watch?v=wQUKxoD8bqY&t=1142s>.

time release date is not listed on VDOC's on-line locator. Therefore, it does not appear that Court and Legal has calculated Mr. Whitmore's sentence, and he is currently considered an "unclassified inmate" under OP830.3 and OP830.4.

57. Mr. Whitmore seeks a determination of his right to earn sentence credits as of his conviction date of December 5, 2025, as provided by statute.

### **CLASS ALLEGATIONS**

58. Plaintiff Whitmore brings this suit as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2) on behalf of himself and similarly situated individuals. VDOC's failure to implement the Program's statutory mandate, and its decision to withhold credits based on an arbitrary policy, affects not just this Plaintiff, but hundreds of other eligible people who are currently or will in the future serve time in VDOC custody. Plaintiff requests that this Court certify a class pursuant to Fed. R. Civ. P. 23(b)(2) consisting of individuals convicted of offenses eligible for sentence credits under Va. Code Ann. § 53.1-202.3(B) and who are or will in the future be incarcerated in any state or local correctional facility after the entry of a final order of conviction.

59. The Plaintiff is a member of the class he seeks to represent. The class asserts claims under 42 U.S.C. § 1983 and meets the requirements of Fed. R. Civ. P. 23(a) and (b) as follows:

a. Numerosity – Fed. R. Civ. P. 23(a)(1): Joinder of all class members is impracticable because of the size of the class. While the exact size of the class is not presently known to Plaintiff, the class results from the application of a policy that VDOC applies to every state-responsible prisoner who is eligible for earned sentence credits and is easily ascertainable via information in VDOC's possession, custody, and control. The average daily population across VDOC facilities in October 2025 was more than 20,000 people. It is likely that some significant percentage of people currently incarcerated in state and local facilities meet the proposed class

definition.

b. Commonality – Fed R. Civ. P. 23(a)(2): The claims raised on behalf of the class raise common questions of law and fact that predominate over questions affecting only individual members. All class members are or will be subject to the same policy: denying sentence credits to otherwise eligible individuals for the period between the person’s incarceration in any correctional facility following entry of a final order of conviction by the committing court, and their arbitrarily assigned custody responsibility date. All class members are or will be subjected to this policy even after VDOC knew or should have known that they were entitled to sentence credits as provided by statute. Other common questions of fact and law include:

- i. How Defendant developed and/or implemented the policy at issue;
- ii. Whether Defendant knew of, yet recklessly disregarded, the risk that the policy would result in over-detention;
- iii. Whether Defendant’s policy and practice of denying statutorily mandated sentence credits violated the substantive due process protections of the Fourteenth Amendment.

c. Typicality – Fed R. Civ. P. 23(a)(3): Plaintiff’s claims are typical of the class. He is eligible to participate in the Program but is or will be subject to VDOC’s policy and practices of denying sentence credits during the period that he is incarcerated between entry of a final order of conviction and VDOC’s assignment of a custody responsibility date, prolonging his period of incarceration, in violation of his legal rights. As a result, he is likely to suffer injuries typical of and common to the class, including the deprivation of constitutional rights, an injury to dignity as a result of prolonged loss of liberty, emotional distress, pain and suffering, and economic injury, including the loss of economic opportunity.

d. Adequacy of Representation – Fed. R. Civ. P. 23(a)(4): Plaintiff and his counsel

will fairly and adequately represent the interests of the class. Plaintiff has no interest that is antagonistic to the interests of the class, and class counsel have extensive experience litigating complex civil rights matters, including class actions, in federal court.

e. Defendant's Actions – Fed. R. Civ. P. 23(b)(2): Defendant has acted or failed to act on grounds generally applicable to the entire class. Specifically, Defendant has created and implemented a policy that is likely to deny Plaintiff and class members earned sentence credits to which they are statutorily entitled, unlawfully prolonging their incarceration.

### **CAUSES OF ACTION**

#### **COUNT 1**

##### **Violation of the Fourteenth Amendment (42 U.S.C. § 1983) Substantive Due Process**

60. Plaintiff incorporates by reference all allegations contained in paragraphs 1-59.
61. Plaintiff has a substantive due process interest in his physical liberty and freedom from unlawful incarceration.
62. Virginia's earned sentence credit program creates a liberty interest protected by the Fourteenth Amendment.
63. By failing to award Plaintiff and those similarly situated sentence credits that they had earned, even though Defendant knows that they were legally entitled to them, Defendant acts with deliberate indifference to the Plaintiff' and class members' substantive due process right to timely release.
64. Plaintiff and class members are or will be harmed by the violation of their due process rights, as well as by each day of unauthorized and unnecessary incarceration.

**REQUEST FOR RELIEF**

65. WHEREFORE, Plaintiff respectfully prays that the Court grant him the following relief:

- a. Certify a class pursuant to Rule 23 of the Federal Rules of Civil Procedure;
- b. Enter a declaratory judgment finding that Defendant's actions violate the rights of Plaintiff and class members under the Fourteenth Amendment to the United States Constitution and that Plaintiff Whitmore and class members are entitled to earned sentence credits beginning on the date of their incarceration following the entry of a final order of conviction;
- c. Grant preliminary and permanent injunctive relief requiring Defendant to calculate ESC-2 credits for eligible individuals beginning on the date of incarceration following the entry of a final order of conviction;
- d. Award costs and reasonable attorneys' fees incurred in this action as provided in 42 U.S.C. § 1988(b); and
- e. Order such other relief as this Court deems just and appropriate.

66. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury on all issues triable as of right.

Respectfully submitted:

/s/ Geri Greenspan  
Geri Greenspan (VSB No. 76786)  
Vishal Agraharkar (VSB No. 93265)  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF VIRGINIA  
P.O. Box 26464  
Richmond, VA 23261  
(804) 491-8584  
[ggreenspan@acluva.org](mailto:ggreenspan@acluva.org)  
[vagraharkar@acluva.org](mailto:vagraharkar@acluva.org)

Liz Lockwood (*pro hac vice* application forthcoming)  
Kathryn Ali (VSB No. 97966)  
ALI & LOCKWOOD LLP  
501 H St. NE, Suite 200  
Washington, D.C. 20002  
(202) 651-2477  
[Liz.lockwood@alilockwood.com](mailto:Liz.lockwood@alilockwood.com)  
[Katie.ali@alilockwood.com](mailto:Katie.ali@alilockwood.com)

*Counsel for Plaintiffs*