IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 23-0172

ANTOINE ANDERSON

Petitioner-Appellant,

v.

HAROLD CLARKE, in his official capacity as Director of the Virginia Department of Corrections; and **KEMSY BOWLES**, in his official capacity as Warden of Coffeewood Correctional Center,

Respondents-Appellees.

REPLY BRIEF OF APPELLANT

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In this case, two pieces of legislation addressing the earned sentence credit statute were passed in different General Assembly sessions but took effect simultaneously. H.B. 5148, which passed in 2020, is explicitly retroactive, dictating that enhanced credits be awarded as to the entirety of eligible sentences. Budget Item 404(R), passed in 2022 as part of a temporary budget bill directing appropriations for a two-year period, has no explicit statement of retroactive intent. Although Respondent-Appellees (hereinafter "VDOC") argue that applying Budget Item 404(R) to render Mr. Anderson ineligible for enhanced sentence credits on his time served prior to the effective date of the Budget Item both reflects legislative intent and does not constitute a retroactive application of the law, this interpretation is not supported by the plain language of the Budget Item and is not permissible under this Court's precedents.[1]

VDOC rests its argument in large part on the fact that Budget Item 404(R) was passed before H.B. 5148 took effect, and therefore, VDOC argues, it modified H.B. 5148 prior to its effective date. But this is factually inaccurate. The Budget Item itself did not take effect until July 1, 2022 – the same day as H.B. 5148 – and

[1] VDOC makes the argument that its application of Budget Item 404(R) is not retroactive for the first time here. In the court below, VDOC conceded that under its interpretation, the Budget Item applied "retroactively and prospectively applied to an inmate's entire sentence." JA83. Respondents further argued at the November 18, 2022 circuit court hearing that "the General Assembly intended for 404(R)(2) to be retroactive in the sense that it is retroactive with the entire implementation of" H.B. 5148. JA146.

thus, it did not have any effect on H.B. 5148 prior to the effective date of both bills. Further, because the budget bill is a temporary appropriations bill and does not amend the code,[2] the Budget Item did not amend Va. Code Ann. § 53.1-202.3 or repeal any part of H.B. 5148. Thus, H.B. 5148 did take effect as passed on July 1, 2022, including the retroactivity provision of that bill found in the enactment clause. As a result, on July 1, 2022, H.B. 5148 did create an entitlement for Mr. Anderson to the enhanced sentence credits for which he was eligible.

To be sure, the Budget Item, upon its effective date, had some impact on the reach of the statutory amendments contained in H.B. 5148. It simply *prospectively* modified the ability of people with mixed sentences to accumulate sentence credits from July 1, 2022 until June 30, 2024. But VDOC's interpretation of the impact of the Budget Item on H.B. 5148 goes too far and requires this Court to read words into the Budget Item that the General Assembly did not see fit to include.

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[2] Section 4-13:00 of the budget bill reflects its temporary nature: "Notwithstanding any other provision of law, **and until June 30, 2024**, the provisions of this act shall prevail over any conflicting provision of any other law…." 2022 Acts ch. 2, at 659, (Spec. Sess. I), https://tinyurl.com/3venuhxj (emphasis added). VDOC acknowledges that the impact of the Budget Item is temporary and will sunset on June 30, 2024. Respondent-Appellees' Brief in Opposition, FN 5; Virginia Department of Corrections, "Earned Sentence Credit Legislation – House Bill 5148 (Chapter 50, 2020 SSI)." House Document No. 7 (2023) at p. 6 ("Additionally, in the event the Budget Item (404)(R)(2) contained in the 2022 Biennial Budget is excluded from future budgets, the earned sentence credit language would revert to the original bill (HB5148) as passed.").

This Court has repeatedly stated that, "[b]ecause 'we can only administer the law as it is written,' the interpretative principle that precedes all others is that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Appalachian Power Co. v. State Corp. Commission*, 301 Va. 257, 279 (2022) (cleaned up). 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(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. 90, 101 (2018) (internal quotations and citations omitted). Thus, the Court must divine the scope and application of the Budget Item from its unambiguous language only.

Contrary to VDOC's assertions, the unambiguous language of the Budget Item does not contain any indication that it applies to time served prior to July 1, 2022 or negates H.B. 5148's express retroactivity provision, let alone a plain and manifest intention to do so. Respondents rely heavily on the Budget Item's *non obstante* clause to argue that it can (and was intended to) be applied to time served prior to July 1, 2022. But this Court has squarely held that a *non obstante* clause does not imply any retroactive intent. *See Appalachian Power Co.*, 301 Va. at 297 ("The non obstante phrase merely means that when subsection E does apply (the

presumption is that it applies prospectively only) it takes precedence over any other conflicting provision of law.").

Further, in comparison to the legislation at issue in *Appalachian Power Co.*, there is even less basis to infer retroactive intent here where the *non obstante* clause specifically excludes from its ambit the portion of H.B. 5148 containing the retroactivity provision. The Budget Item's *non obstante* clause references only "the provisions of [Va. Code Ann.] § 53.1-202.3," and not H.B. 5148 as a whole (or "any other provision of law," as was the case in the legislation examined in *Appalachian Power Co.*). Thus, to the extent that the Budget Item limits any part of H.B. 5148, it limits only the parts of that act that became part of Va. Code Ann. § 53.1-202.3. This is a key distinction, because the retroactivity language of H.B. 5148 is found in the enactment clause of the bill, not in the code section that the bill amended and to which the Budget Item referred. Because the Budget Item's *non obstante* clause refers only to the code, this Court cannot assume that the General Assembly intended the limiting provision of the Budget Item to also apply to the enactment clause in H.B. 5148. Had the General Assembly intended for the Budget Item to do so, or to reach beyond the time period in which the budget bill is effective in any way, it would have said that explicitly.[3]

[3] The U.S. Supreme Court held similarly in *Martin v. Hadix*, 527 U.S. 343, 353 (1999), when analyzing statutory language capping awards of attorney's fees: "The fundamental problem with all of petitioners' statutory arguments is that they stretch

This plain language reading of the Budget Item comports with this Court's jurisprudence establishing the general rule that statutes operate prospectively only. In attempting to circumvent this rule, VDOC attempts to narrow the definition of retroactivity to encompass only those laws that impact vested or established rights or interests. However, the presumption against retroactivity has never been limited to statutes that affect only vested rights. Appellant's Opening Brief 15-16; *see also Martin v. Hadix*, 527 U.S. 343, 359 (1999) ("While it may be possible to generalize about types of rules that ordinarily will not raise retroactivity concerns, … these generalizations do not end the inquiry." (internal citations omitted)). Accordingly, the presumption against retroactivity has become a default rule that applies even when statutes do not necessarily impair vested rights. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 272–73 (1994) ("But while the constitutional impediments to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule. … Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.").

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the language of § 803(d) to find congressional intent on the temporal scope of that section when we believe that § 803(d) is better read as setting substantive limits on the award of attorney's fees…. In other words, these sections define the substantive availability of attorney's fees; they do not purport to define the temporal reach of these substantive limitations."

VDOC also argues that "context" provides sufficient evidence to conclude that the General Assembly intended for the Budget Item to apply to time served prior to July 1, 2022. But because the plain language of the Budget Item is unambiguous, there is no need to look to context clues to divine the meaning of the legislation. Even if it were necessary to look to that context, there is more contextual support for an interpretation limiting the temporal reach of the Budget Item to the time period in which the budget bill is in effect. First, the budget bill is an inherently forward-looking bill, in that it directs the Commonwealth's appropriations for the upcoming two years. This Court has noted that forward-looking language in a statute weighs against an inference of retroactive intent. *City of Charlottesville v. Payne*, 299 Va. 515, 530 (2021).

Further, the legislative fact pattern in this case is substantially similar to the situation presented in *Appalachian Power Co.* – a case which VDOC does not address or attempt to distinguish. In that case, this Court held that legislation without explicit retroactivity language could not be applied retroactively because it lacked "a manifest and plain intention" for such application. 301 Va. at 298. In pointing out that a second piece of legislation, passed in the same session and amending the same code section, included explicit retroactivity language, the Court noted that "the contextual language of other amendments made to the same statute in the same General Assembly session demonstrates that subsection E was not

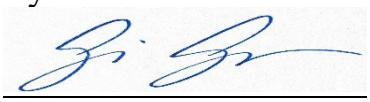
intended to operate retroactively." *Id.*; s*ee also Berner v. Mills*, 265 Va. 408, 414 (2003) ("We also observe that, in enacting other amendments to the Act, the General Assembly employed language plainly manifesting a retroactive intent under the provisions of Code § 1–13.39:3. … The General Assembly's failure to use language of this nature in the bill reenacting Code §§ 8.01–273.1 and 38.2–5001 further demonstrates that the amendments to that section were not intended to be applied retroactively.").

The same is true here. One piece of legislation (H.B. 5148) contains explicit retroactivity language. The other (Budget Item 404(R)) does not. The General Assembly was clearly aware of H.B. 5148's retroactivity clause and the general rule that explicit language is required to communicate the intent for a law to operate retroactively. And yet, the General Assembly failed to include any such language in Budget Item 404(R). This context weighs heavily against any interpretation that the General Assembly intended the Budget Item to apply to time served prior to its effective date.

There are many ways in which the General Assembly could have passed legislation to render people with mixed sentences ineligible for enhanced sentence credits on time served prior to July 1, 2022. It could have repealed H.B. 5148 in its entirety. It could have passed legislation that further amended Va. Code Ann. §

53.1-202.3.[4] It could have included explicit language in Budget Item 404(R) to clarify its intended temporal reach. But it did none of those things. Instead, it included a temporary, forward-looking provision in a temporary, forward-looking bill. This compels the conclusion that the Budget Item operates prospectively only and does not prevent the award of retroactive sentence credits for time served prior to July 1, 2022, as provided in H.B. 5148.

RESPECTFULLY SUBMITTED,
ANTOINE ANDERSON
By Counsel:



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[4] In fact, legislation was introduced during the 2022 regular session of the General Assembly to do both of those things, but neither passed. *See*, *e.g.*, House Bill 578 (2022) and House Bill 735 (2022).

CERTIFICATE OF SERVICE

In accordance with Rule 5:1B(c), I, Geri Greenspan, certify that on July 19, 2023, a copy of the foregoing Reply Brief of Appellant 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.