

IN THE
SUPREME COURT OF VIRGINIA

Record No. 230688

LESLIE L. PURYEAR,
Petitioner,

v.

CHADWICK DOTSON, in his official capacity as Director of the
Virginia Department of Corrections; and MACK BAILEY, in his official
capacity as Warden of Lunenburg Correctional Center,
Respondents.

RESPONDENTS' MOTION TO DISMISS THE PETITION
AND MEMORANDUM IN SUPPORT

JASON S. MIYARES
Attorney General

CHARLES H. SLEMP III
Chief Deputy Attorney General

MARIA N. WITTMANN
Deputy Attorney General

LAURA H. CAHILL (#86328)
Assistant Attorney General

MARGARET HOEHL O'SHEA (#66611)
Senior Assistant Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-5630 – Telephone
(804) 584-7045 – Facsimile
LCahill@oag.state.va.us

November 6, 2023

Counsel for Respondents

TABLE OF CONTENTS

Page(s)

INTRODUCTION.....	1
EXHIBITS	1
STATEMENT	2
ARGUMENT	9
I. The Petition was not filed within the one-year limitations period established by Code § 8.01-654(A)(2) and therefore should be dismissed.	9
II. There is no basis to toll the one-year limitations period established by Code § 8.01-654(A)(2).	13
CONCLUSION.....	14
CERTIFICATE.....	16

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Clarke,
— Va. —, 2023 Va. LEXIS 41 (Oct. 12, 2023) 3, 4, 6

Booker v. Dir. of the Dep’t of Corr.,
284 Va. 6 (2012) 9

Brown v. Booker,
297 Va. 245 (2019) 13

Compton v. Milam,
No. 7:21-cv-00494, 2022 U.S. Dist. LEXIS 68372 (W.D.
Va. Apr. 13, 2022) 12

Eisert v. Clarke,
No. 7:21cv00068, 2021 U.S. Dist. LEXIS 97481 (W.D. Va.
Apr. 30, 2021)..... 12

Hicks v. Dir., Dep’t of Corr.,
289 Va. 288 (2015) 13

Hines v. Kuplinski,
267 Va. 1 (2004) 13

Prease v. Clarke,
888 S.E.2d 758 (2023) 5, 11

Shortt v. Va. Dep’t of Corr.,
No. 7:22-cv-00143, 2022 U.S. Dist. LEXIS 67434 (W.D.
Va. Apr. 12, 2022) 12

Speller v. Johnson,
No. 3:09CV463, 2012 U.S. Dist. LEXIS 42312 (E.D. Va.
Mar. 27, 2012) 12

Tonkins v. Commonwealth,
No. CL87650, 2009 Va. App. LEXIS 595 (Apr. 14, 2009) 12

Wallace v. Jarvis,
726 F. Supp. 2d 642 (W.D. Va. 2010)..... 12

Statutes

Section 18.2-90, Code of Virginia	3
Section 53.1-202.2, Code of Virginia	2, 3
Section 53.1-202.3(A), Code of Virginia	passim
Section 53.1-202.3(B), Code of Virginia	4, 7, 9, 12
Section 53.1-202.3, Code of Virginia	passim
Section 53.1-202.4, Code of Virginia	2
Section 8.01-229(D), Code of Virginia.....	13
Section 8.01-229, Code of Virginia	13
Section 8.01-230, Code of Virginia	10
Section 8.01-654(A)(2), Code of Virginia.....	passim
Section 8.01-654(B)(4), Code of Virginia.....	14
Section 8.01-660, Code of Virginia	1
Section 8.01-695, Code of Virginia	14

Other Authorities

2020 Acts ch. 50 (Spec. Sess. I)	4, 5
2022 Acts ch. 2 (Spec. Sess. I)	6
Rule 5:7(a)(1), Rules of the Supreme Court of Virginia	9
Rule 5:7(a)(5), Rules of the Supreme Court of Virginia	1
Rule 5:7(b)(6), Rules of the Supreme Court of Virginia	14

INTRODUCTION

Petitioner asks this Court for a writ of habeas corpus on the ground that the Virginia Department of Corrections (VDOC) misinterpreted Code § 53.1-202.3(A) and, as a result, it miscalculated his release date. Specifically, Puryear claims that VDOC incorrectly determined that his sentence includes a sentence for an offense listed in subsection (A) of Code § 53.1-202.3, rendering him ineligible to earn enhanced earned sentence credits. However, Puryear filed this Petition on September 26, 2023, more than one year after his cause of action accrued on the effective date of the amendments to Code § 53.1-202.3, July 1, 2022. Indeed, Puryear filed this Petition more than one year after he received personal notification on July 29, 2022, that VDOC determined that he was ineligible to earn enhanced sentence credits. The Petition is untimely pursuant to Code § 8.01-654(A)(2). This Court should therefore dismiss the petition.

EXHIBITS

Pursuant to Code § 8.01-660 and in accordance with Rule 5:7(a)(5), Respondents submit as Exhibit 1 an affidavit of Jennifer M. Johnson, an Institutional Program Manager (IPM) at State Farm Correctional

Center (SFCC), a Virginia Department of Corrections (VDOC) facilities—in that capacity, IMP Johnson is responsible for overseeing the daily operations of inmate job assignments, all inmate programs and religious services. (“Johnson Aff.”). Respondents submit as Exhibit 2 an affidavit of Donna M. Shiflett, Manager of VDOC’s Court and Legal Services Section, which is responsible for computing inmates’ sentences and projecting the discretionary parole eligibility date, mandatory parole release date, and good-time release date. (“Shiflett Aff.”). Respondents request that this Court consider these affidavits and the accompanying enclosures as evidence in this matter.

STATEMENT

Chapter 6 of Title 53.1 of the Code of Virginia governs computation of an inmate’s term of confinement in state and local correction facilities, including defining when the term commences, providing credit for time spent in pre-trial detention, and establishing systems for awarding good time credit. For felony offenses committed on or after January 1, 1995, Code §§ 53.1-202.2 through 53.1-202.4 establishes the earned sentence credit (ESC) system. Prior to July 1, 2022, all eligible prisoners participating in the ESC system could earn a

maximum of 4.5 credits for every 30 days served. *See* Code § 53.1-202.3 (effective until July 1, 2022); *Anderson v. Clarke*, __ Va. __, __, 2023 Va. LEXIS 41, at *2–*4 (Oct. 12, 2023); Shiflett Aff. ¶ 12.

Because Puryear was sentenced and committed to VDOC on August 30, 2011 to serve sentences for multiple felonies committed after January 1, 1995, he earns good time credit for those felony convictions under the ESC system. Code § 53.1-202.2; Shiflett Aff. ¶ 11, Enclosures A and B; see also Pet. ¶ 9. Specifically, Puryear is currently serving an active term of incarceration in VDOC custody totaling 18 years, 8 months, and 26 days for numerous felony convictions, and felony and misdemeanor probation revocation convictions imposed by the Petersburg Circuit Court,¹ the Mecklenburg Circuit Court, and the

¹ Several of the felonies that Puryear was convicted of in the Petersburg Circuit Court—*i.e.*, Conspiracy to Commit Robbery, Accessory to a Felony After the Fact, and Burglary with intent to Murder/Rape Etc., in violation of Code § 18.2-90—the circuit court opted to suspend the entire sentence, leaving no active period of incarceration to be satisfied during Puryear’s current term of incarceration—with the exception of his felony convictions for Attempted Robbery and Use of a Firearm in the Commission of a Felony. See Shiflett Aff. ¶ 6, Enclosures A and B.

Brunswick General District Court, respectively. Shiflett Aff. ¶¶4–8, Enclosures A and B.

In 2020, the General Assembly passed, and the Governor signed, House Bill 5148 (HB 5148), amending Code § 53.1-202.3. *See* 2020 Acts ch. 50 (Spec. Sess. I). The revised statutory scheme created a two-tier system whereby prisoners convicted of certain enumerated offenses could only receive a maximum of 4.5 days credits for every 30 days served. Code § 53.1-202.3(A). In contrast, prisoners convicted of an offense other than those enumerated in Code § 53.1-202.3(A) were eligible to receive expanded earned sentence credits. Code § 53.1-202.3(B)—up to a maximum of 15 days credit per 30 days served. *Id.*

In addition to amending the existing provisions of Code § 53.1-202.3 to create the new two-tier system ESC system, HB 5148 contained an enactment clause. *Anderson v. Clarke*, No. 230172, 2023 Va. LEXIS 41, at *3–*4. The enactment clause provided that the implementation of the new two-tiered system would not become effective until July 1, 2022. 2020 Va. Acts, Spec. Sess. I, Ch. 50. Additionally, the enactment clause provided that the amendments were to “apply retroactively to the entire sentence of any person who is

confined in a state correctional facility and participating in the earned sentence credit system on July 1, 2022.” *Id.* In apparent recognition of the fact that applying the new expanded earned sentence credits might render some prisoners eligible for immediate release, the General Assembly further provided that, [i]f it is determined that, upon retroactive application of the provisions of § 53.1-202.3 . . . , the release date of any such person passed prior to the effective date of this act, the person shall be released upon approval of an appropriate release plan and within 60 days of such determination unless otherwise mandated by court order.” *Id.*

Upon the passage of HB5148 in 2020, VDOC began attempting to identify which prisoners would be eligible and which of those prisoners would be eligible for release upon the effective date of July 1, 2022, or would be eligible for release shortly thereafter. See *Prease v. Clarke*, 888 S.E.2d 758, 760 (2023). On April 14, 2022, VDOC’s inmate population was informed by letters that were posted in every housing unit that any changes in sentence calculations resulting from the amendments to Code § 53.1-202.3 would not happen until July 1, 2022,

the date those amendments became effective. See Shiflett Aff. ¶ 15, Enclosure D.

In 2022, prior to HB5148's effective date, the General Assembly took additional action regarding the ESC system. Specifically, in adopting the 2022 Appropriation Act, which was signed by the Governor on June 22, 2022, "the General Assembly modified the ESC program by including Budget Item 404(R)(2)." *Anderson*, 2023 Va. LEXIS 41, at *7 (citing 2022 Acts ch. 2 (Spec. Sess. I)). Budget Item 404(R)(2) provides that "[n]otwithstanding the provisions of § 53.1-202.3, Code of Virginia, a maximum of 4.5 sentence credits may be earned for each 30 days served on a sentence that is concurrent with or consecutive to a sentence for a conviction of an offense enumerated in subsection A of § 53.1-202.3, Code of Virginia." 2022 Acts ch. 2 (Spec. Sess. I). Budget Item 404(R)(2) expressly "render[s] anyone who is serving both a sentence or sentences for eligible offenses along with a sentence or sentences for a disqualifying offense ineligible to receive more than 4.5 ESCs for each 30 days served." *Anderson*, 2023 Va. LEXIS 41, at *11. On June 24, 2022, VDOC's inmate population were once again reminded by letters that were posted in every housing unit that any

changes in sentence calculations resulting from the amendments to Code § 53.1-202.3 would not happen until July 1, 2022, the date those amendments became effective. Shiflett Aff. ¶ 17, Enclosure E.

In addition to the April 14 and June 24, 2022 letters advising the inmate population that any sentence-credit changes resulting from Code § 53.1-202.3 would take place from the statute's July 1, 2022 effective date, Shiflett Aff. ¶¶ 15, 17, Enclosures D and E, Puryear acknowledges that sometime after April 13, 2022, VDOC notified him that he was ineligible for the enhanced rate of ESC credit set forth in subsection (B) of Code § 53.1-202.3, Pet. ¶ 14; Pet.'s Mem. Supp. at 2, 7. Further, on July 28, 2022, Puryear's wife contacted VDOC headquarters by email, requesting that VDOC facility staff speak with Puryear to notify him that he was ineligible for enhanced earned sentence credits. Johnson Aff. ¶ 4. On July 29, 2022, two VDOC facility staff members, IMP Johnson and Major Booker, personally spoke with Puryear and explained to him that he was ineligible for enhanced earned sentence credits due to his sentence for attempted robbery. Johnson Aff. ¶ 5. IMP Johnson explained that when VDOC finalized its review of his convictions, Puryear was "determined to be ineligible for

enhanced earned sentence credit due to his attempted robbery sentence.” Johnson Aff. ¶ 5. Puryear indicated that he understood and thanked Major Booker and IMP Johnson “for notifying him of his ineligibility and for coming to speak with him personally.” Johnson Aff. ¶ 5. IMP Johnson then entered a note in inmate Puryear’s record in VDOC’s computer-based inmate information management system, CORIS, documenting her conversation with Puryear that occurred on July 29, 2022, and confirming notification had been completed. Johnson Aff. ¶ 6, Enclosure A.

More than a year after initially learning of Code § 53.1-202.3’s potential effect on his sentence in the April and June 2022 letters, the statute actually becoming effective on July 1, 2022, and after Major Booker and IMP Johnson directly notified him that he was ineligible for enhanced credits on July 29, 2022, Puryear finally filed a petition for a writ of habeas corpus on September 26, 2023. His petition argued that VDOC improperly denied him expanded earned sentence credits when it determined that Puryear’s sentence includes a sentence for an offense listed in subsection (A) of Code § 53.1-202.3, rendering him ineligible to

earn sentence credits under subsection (B) of Code § 53.1-202.3. Pet. ¶1; see generally Pet.'s Mem. Supp.

ARGUMENT

I. The Petition was not filed within the one-year limitations period established by Code § 8.01-654(A)(2) and therefore should be dismissed.

Code § 8.01-654(A)(2) requires any “petition for a writ of habeas corpus ad subjiciendum, other than a petition challenging a criminal conviction or sentence, shall be brought within one year after the cause of action accrues.” See also Rule 5:7(a)(1)²; *e.g.*, *Booker v. Dir. of the Dep’t of Corr.*, 284 Va. 6, 6 (2012) (holding that the “limitation period for habeas corpus petitions challenging revocation hearings is one year after the cause of action accrues”).

Puryear does not challenge his conviction or sentence, but instead asserts that VDOC improperly determined he was ineligible to earn the higher rate of ESC based on amendments to Code § 53.1-202.3 that

²“The petition for a writ of habeas corpus challenging a criminal conviction or sentence must be filed within two years from the date of the final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later. *All other petitions for a writ of habeas corpus must be filed within one year after the cause of action accrues.*” Rule 5:7(a)(1)(emphasis added).

went into effect on July 1, 2022. Pet. ¶¶ 1, 5 n.1. Although this Court has not specifically stated when the cause of action accrues for a habeas claim related to the improper denial of sentence credit, Puryear’s petition is untimely by any measure.

Generally, a cause of action is “deemed to accrue and the prescribed limitation period [] begin[s] to run from the date the injury is sustained,” regardless of when the resulting damage is discovered, “except where the relief sought is solely equitable.” Code § 8.01-230. Here, the April and June 2022 letters to the inmate population notified inmates that the amendments to Code § 53.1-202.3—and any effect they would have on earned sentence credits and release date—would take effect on July 1, 2022. The amended statute then took effect on that date, giving rise to Puryear’s habeas cause of action: as he alleges, “VDOC[] misappli[ed] and misinterpret[ed] . . . § 53.1-202.3(A),” and thus “wrongfully denied [him] earned sentence credits that, if awarded, would result in his immediate release.” Pet. 1, ¶ 1. Puryear’s cause of action therefore accrued on July 1, 2022, the date on which he sustained his injury. See Code §§ 8.01-654(A)(2); 8.01-230.

That Puryear’s cause of action accrued on July 1, 2022 is consistent with *Prease*, the primary case on which he relies, and which arose from the same statutory amendments. There, the petitioner—represented by the same counsel as Puryear is—alleged that his “cause of action accrued on July 1, 2022, the date on which VDOC was to have applied the expanded earned sentence credits to Mr. Prease’s sentence.” Pet. for Writ of Habeas Corpus at 1, *Prease v. Clarke*, 888 S.E.2d 758, __ Va. __, __ (2023) (No. 220665). Because Puryear did not file his habeas petition until September 26, 2023, well over a year after his cause of action accrued on July 1, 2022, this Court should dismiss his petition.

But even if Puryear were to argue that a cause of action for this type of habeas claim accrues at the time that the inmate-petitioner *discovers* the denial of credit, Puryear’s petition would still be untimely.³ On July 29, 2022, Puryear learned for certain that VDOC

³ This Court has never held that a discovery rule governs the accrual date for habeas petitions based on sentence-credit calculations, although the Court of Appeals has, in an unpublished order, suggested that a habeas petitioner’s “awareness of the issue[s] raised” in the petition is relevant to the Code § 8.01-654(A)(2) limitations period. See *Tonkins v. Commonwealth*, No. CL87650, 2009 Va. App. LEXIS 595, at

had determined that he was ineligible for enhanced sentence credit. On that date, IMP Johnson and Major Booker notified Puryear that due to his sentence for attempted robbery, he was ineligible to earn ESC at the higher rate of earned sentence credit set forth in subsection (B) of Code § 53.1-202.3, and therefore his release date would not be recalculated. Johnson Aff. ¶ 5. In other words, no later than July 29, 2022, Puryear was aware of all facts supporting the sole claim in his present petition.

Consequently, the action could have accrued in this case at the *very latest* on July 29, 2022. Because Puryear waited more than a year

*1 (Apr. 14, 2009) (denying habeas petition when petitioner was aware of the “jail credit” computation issues on which his petition was based for nearly three years before filing his petition). Several federal district courts have interpreted this type of habeas claim to accrue, for purposes of the limitations period in Code § 8.01–654(A)(2), *at the very latest* at the time that the inmate-petitioner discovers the improper denial of credit or discovers the error in his sentence calculation. See, e.g., *Wallace v. Jarvis*, 726 F. Supp. 2d 642, 645-46 (W.D. Va. 2010) (holding that the inmate had “one year from discovering that he would not be given credit for 31 days he spent in pretrial confinement . . . to file a state petition for writ of habeas corpus”); *Compton v. Milam*, No. 7:21-cv-00494, 2022 U.S. Dist. LEXIS 68372, at *3-4 (W.D. Va. Apr. 13, 2022); *Shortt v. Va. Dep’t of Corr.*, No. 7:22-cv-00143, 2022 U.S. Dist. LEXIS 67434, at *6 (W.D. Va. Apr. 12, 2022); *Eisert v. Clarke*, No. 7:21cv00068, 2021 U.S. Dist. LEXIS 97481, at *4-6 (W.D. Va. Apr. 30, 2021); *Speller v. Johnson*, No. 3:09CV463, 2012 U.S. Dist. LEXIS 42312, (E.D. Va. Mar. 27, 2012).

to file this Petition on September 26, 2023, his claim is barred by the one-year statute of limitations enumerated in Code § 8.01-654(A)(2).

II. There is no basis to toll the one-year limitations period established by Code § 8.01-654(A)(2).

Code § 8.01-654(A)(2) “contains no exception allowing a petition to be filed after the expiration of these limitations periods.” *Hines v. Kuplinski*, 267 Va. 1, 2 (2004) (dismissing the petition as time bared because the “record shows that Hines could have discovered the basis for his habeas claim well within the limitations period established by Code § 8.01-654(A)(2)”).

Although this Court has previously held that in limited circumstances the tolling provisions contained in Code § 8.01-229 *may* toll the limitations period contained in Code § 8.01-654(A)(2), this case presents no facts applicable to the provisions of Code § 8.01-229 that could provide a basis to toll the limitations period. See *Brown v. Booker*, 297 Va. 245, 246, n.1 (2019) (“Code § 8.01-229 provides for tolling of the limitation period [contained in Code § 8.01-654(A)(2)] for reasons not applicable here.”); but see *Hicks v. Dir., Dep’t of Corr.*, 289 Va. 288, 298 (2015) (holding that failure to disclose exculpatory evidence may toll limitation period pursuant to Code § 8.01-229(D)).

CONCLUSION

For the foregoing reasons, the Petition is barred by the one-year statute of limitations as set forth in Code § 8.01-654(A)(2). Accordingly, Puryear's petition for a writ of habeas corpus should be denied and dismissed by this Court.

In accordance with Rule 5:7(b)(6) of the Rules of the Supreme Court of Virginia, Respondents submit that this Court may deny and dismiss this petition as a matter of law without requiring an evidentiary hearing. See also Code § 8.01-654(B)(4); Code § 8.01-695.

Respectfully submitted,

CHADWICK DOTSON,
DIRECTOR VIRGINIA
DEPARTMENT OF
CORRECTIONS; AND MACK
BAILEY, WARDEN OF
LUNENBURG
CORRECTIONAL CENTER

/s/ Laura H. Cahill
LAURA H. CAHILL (#86328)
Assistant Attorney General

JASON S. MIYARES
Attorney General

MARGARET HOEHL O'SHEA (#66611)
Senior Assistant Attorney General

CHARLES H. SLEMP III
Chief Deputy Attorney General

MARIA N. WITTMANN
Deputy Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-5630 – Telephone
(804) 584-7045 – Facsimile
lcahill@oag.state.va.us

November 6, 2023

Counsel for Respondents

CERTIFICATE

I certify that on November 6, 2023, this document was filed electronically with the Court through VACES. Copies were electronically mailed to:

Geri Greenspan, VSB #76786
Vishal Agraharkar, VSB #93265
ACLU of Virginia
701 E. Franklin St., Suite 1412
Richmond, VA 23219
Phone: (804) 491-8584
ggreenspan@acluva.org
vagraharkar@acluva.org

Rebecca Livengood (Pro Hac Vice)
(DC Bar No. 1674010)
RELMAN COLFAX PLLC
1225 19th ST N.W., Suite 600
Washington, DC 20036
Phone: (202) 728-1888
rlivengood@relmanlaw.com

Counsel for Petitioner

I further certify that this Response complies with Rule 5:7(a)(7) because it does not exceed 50 pages or 8,750 words, excluding the exhibits, cover page, table of contents, table of authorities, signature blocks, and certificate.

/s/ Laura H. Cahill
LAURA H. CAHILL (#86328)