

IN THE  
SUPREME COURT OF VIRGINIA

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RECORD NO. \_\_\_\_\_

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**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.*

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**PETITION FOR WRIT OF HABEAS CORPUS**

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## **PETITION FOR WRIT OF HABEAS CORPUS**

COMES NOW the Petitioner, Leslie L. Puryear, State ID #1387533, by and through counsel, and respectfully submits his Petition for a Writ of Habeas Corpus seeking relief from his unlawful detention, having been wrongfully denied earned sentence credits that, if awarded, would result in his immediate release from incarceration. In support of his petition, Mr. Puryear states the following:

### **INTRODUCTION**

1. This action arises out of the Virginia Department of Corrections' (VDOC) erroneous interpretation of Va. Code. Ann. § 53.1-202.3(A) to apply to inchoate offenses that are not specifically enumerated in that subsection. By virtue of the 2020 legislative expansion of the earned sentence credit program, Mr. Puryear earned sufficient sentence credits during his incarceration to be released from VDOC custody in approximately July 2022. However, as a result of VDOC's misapplication and misinterpretation of § 53.1-202.3(A), Mr. Puryear is facing additional years of imprisonment, and VDOC now projects his release date as April 21, 2025.

2. This Petition presents no disputed material facts and a purely legal question; the taking of evidence is therefore unnecessary. This Court can make a determination on the merits on the basis of the record. *See* Va. Code Ann. § 8.01-654(B)(4) ("In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its

determination whether such writ should issue on the basis of the record.”); Va. S.Ct. Rules 5:7(a)(2).

### **JURISDICTION**

3. This Court has original jurisdiction to hear this Petition pursuant to Va. Code Ann. § 17.1-310 and Rule 5:7(a) of the Rules of the Supreme Court of Virginia.

### **PARTIES**

4. Petitioner, Leslie L. Puryear, is currently incarcerated at Lunenburg Correctional Center. He is serving an active sentence on convictions entered in the Petersburg and Mecklenburg Circuit Court as follows:

<b>Case Number</b>	<b>Offense</b>	<b>Offense Date</b>	<b>Code Section</b>	<b>Sentence</b>	<b>Court</b>
CR06A00514-00	Probation Violation	06/24/2010	19.2-306	5 years	Mecklenburg
CR06A00514-01	Probation Violation	06/24/2010	19.2-306	5 years	Mecklenburg
CR10000975-00	Use of Firearm in Commission of a Felony	04/26/2010	18.2-53.1	3 Years, consecutive with others	Petersburg
CR10000976-00	Attempts to Rob	04/26/2010	18.2-58; 18.2-26	40 Years; 35 suspended, consecutive with others	Petersburg

Those sentences run consecutively; Mr. Puryear therefore has a total of 18 years to serve. A true and correct copy of Mr. Puryear's sentencing order is attached as Exhibit 1.

5. Mr. Puryear has not previously filed any habeas petitions challenging the convictions listed above or the conditions of his confinement.<sup>1</sup>

6. Respondent Chadwick Dotson is the Director of the Virginia Department of Corrections and is named in his official capacity. Director Dotson is ultimately responsible for the policies and procedures of the VDOC regarding the implementation of the earned sentence credit program.

7. Respondent Mack Bailey is the Warden of the Lunenburg Correctional Center and is named in his official capacity. Warden Bailey is ultimately responsible for the implementation of the earned sentence credit program as to individuals incarcerated at the Lunenburg Correctional Center.

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<sup>1</sup> Given that this Petition does not challenge Mr. Puryear's underlying convictions or sentence, and only challenges his continued detention in light of statutory amendments to the earned sentence credit program, Petitioner has not at this stage provided a complete record of the proceedings below but has attached the portions of the record that are relevant to this Petition. A formal Motion for Leave to Proceed with Less than Complete Record pursuant to Rule 5:7(a)(6) of the Supreme Court of Virginia will be forthcoming upon the Respondents' response.

## FACTUAL BACKGROUND

8. Most incarcerated individuals in VDOC are eligible to earn reductions in their original sentences for demonstrating good behavior and participating in rehabilitative programs. Va. Code Ann. § 53.1-202.3. Before July 1, 2022, an incarcerated person could earn a maximum of 4.5 “earned sentence credits”<sup>2</sup> for every 30 days served. *Id.* This system applied to anyone with a felony offense committed on or after January 1, 1995.

9. Mr. Puryear was sentenced and committed to VDOC custody on January 11, 2011, well after the effective date for the earned sentence credit program and was eligible to participate in that program. *See* Va. Code Ann. § 53.1-202.2(A); Virginia Department of Corrections Operating Procedure 830.3, effective July 1, 2022 (“OP 830.3” and attached as Exhibit 2).

10. In 2020, Virginia’s General Assembly amended the earned sentence credit program to better incentivize incarcerated people to pursue personal improvement opportunities and to recognize those that had already done so during their sentences. 2020 Va. Acts Spec. Sess. I, chs. 50, 52 (“H.B. 5148”). Under the

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<sup>2</sup> “Sentence credit” and “earned sentence credit” are “deductions 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).

new law, many incarcerated people are eligible for significantly expanded earned sentence credits. Eligibility for expanded credits is determined based on one's conviction: individuals serving sentences for certain enumerated felony convictions remain eligible for a maximum of 4.5 earned sentence credits for every 30 days served. Va. Code Ann. § 53.1-202.3(A). Individuals serving sentences for any other conviction are now eligible to earn as many as 15 sentence credits for every 30 days served. Va. Code Ann. § 53.1-202.3(B). The rate at which all individuals earn sentence credits is based on a classification scheme. *Id.*<sup>3</sup> Classification levels are assigned based on an individual's employment status, behavior, and participation in programs and treatment. *Id.* This new scheme also removes some of the discretion that VDOC has for awarding credits, instead conditioning credits on specific criteria that individuals must meet. *Id.*

11. These provisions became effective on July 1, 2022. The General Assembly explicitly applied the law retroactively so that those currently incarcerated

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<sup>3</sup> Under the old system, individuals classified as Level I are eligible for 4.5 earned sentence credits (ESCs) for every 30 days served; those classified as Level II are eligible for 3 ESCs for every 30 days served; those classified as Level III are eligible for 1.5 ESCs for every 30 days served; and those classified as Level IV are eligible for 0 ESCs for every 30 days served. For those eligible for expanded credits under the new scheme, individuals classified as Level I are eligible for 15 ESCs for every 30 days served; those classified as Level II are eligible for 7.5 ESCs for every 30 days served; those classified as Level III are eligible for 3.5 ESCs for every 30 days served; and those classified as Level IV are eligible for 0 ESCs for every 30 days served.

would have the benefit of these expanded earned sentence credits for the totality of their sentences prior to the effective date of the law. The enactment clause to H.B. 5148 provides:

That the provisions of § 53.1-202.3 of the Code of Virginia, as amended by this act, ***shall 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. If it is determined that, upon retroactive application of the provisions of §53.1-202.3 of the Code of Virginia, as amended by this act, 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.

H.B. 5148(1)(D) (emphasis added). The delay between the enactment of the law and the effective date was intended to give VDOC time to implement the new system and re-calculate the sentences of those eligible for additional sentence credits.

12. On December 21, 2021, Attorney General Mark R. Herring released an Opinion in response to questions from Harold Clarke, former Director of VDOC. Va. Off. Att’y Gen. Op. No. 21-068 (Dec. 21, 2021), 2021 WL 6112902 at \*1 (hereinafter the “Herring Opinion” and attached as Exhibit 3). Each of those questions related to the interpretation and application of Va. Code Ann. § 53.1-202.3(A). All of the questions asked about which offenses were disqualified from earning expanded earned sentence credits, including whether inchoate offenses were disqualified even if not specifically enumerated in the statute. Attorney General Herring provided a full response. Notably, Attorney General Herring interpreted Va.

Code Ann. § 53.1-202.3(A) to conclude that the inchoate offenses of solicitation, conspiracy, and attempt qualify for the expanded earned sentence credits under Va. Code Ann. § 53.1-202.3(B), unless such offenses are explicitly enumerated in Va. Code Ann. § 53.1-202.3(A).

13. Subsequent to the change in administration in January 2022, VDOC requested a reconsideration of the exact same questions from the new Attorney General. On April 13, 2022, Attorney General Miyares issued a new opinion, which differed from the Herring Opinion in significant parts. Va. Off. Att’y Gen. Op. No. 22-008 (Apr. 13, 2022), 2022 WL 1178995 at \*1 (hereinafter the “Miyares Opinion” and attached hereto as Exhibit 4). As relevant to this case, Attorney General Miyares reached the opposite conclusion from the Herring Opinion on whether the inchoate offenses of solicitation, conspiracy, and attempt should be disqualified under Va. Code Ann. § 53.1-202.3(A) from earning the expanded earned sentence credits under Va. Code Ann. § 53.1-202.3(B). He concluded that those inchoate offenses are encompassed in the term “any felony violation” as used in Va. Code Ann. § 53.1-202.3(A), and are thus disqualified from earning the expanded sentence credits.

14. VDOC, in accord with the Herring Opinion, notified Mr. Puryear that he had been awarded the expanded credits and assisted him in completing re-entry counseling and contacting his family. However, months after the Miyares Opinion was released, VDOC subsequently declined to release Mr. Puryear or award him his



earned sentence credits. Mr. Puryear had no intervening disciplinary charges, maintaining GCA Level 1 throughout his incarceration, entitling him to the expanded credits. Miyares and VDOC's erroneous interpretation of the statute is the sole reason for his continued detention. On July 6, 2023, this Court issued its opinion in *Prease v. Clarke*, 888 S.E.2d 758, 760 (Va. 2023), in which it reasoned that unless an offense is specifically enumerated in Va. Code Ann. § 53.1-202.3(A), it is eligible for enhanced sentence credits.

15. VDOC has relied on the Miyares Opinion to bar Mr. Puryear from eligibility from expanded earned sentence credits and has failed to apply this Court's ruling in *Prease* to Mr. Puryear. But the Miyares Opinion conflicts with *Prease* and does not comport with fundamental rules of statutory construction.

16. Mr. Puryear's convictions are not listed in Va. Code Ann. § 53.1-202.3(A) as excluded from earning expanded earned sentence credits. Attempted robbery is not specifically enumerated in that subsection, nor is attempted robbery encompassed in the chapters and titles of the criminal code that are specifically enumerated in that subsection. None of Mr. Puryear's other sentences (use of a firearm in commission of a felony, accessory after the fact, and two parole violations) are listed in the statute.

17. Mr. Puryear has been incarcerated for more than 13 years, and he has maintained GCA Level 1 classification for more than 10 years, since shortly after

entering the VDOC system, entitling him to the maximum number of credits (15 credits per 30 days served). He is currently incarcerated at Lunenburg Correctional Center.

18. Mr. Puryear has worked hard to earn sentence credits in the time he has been incarcerated. He has completed mental health and job readiness programs, including Thinking for A Change and Ready for Work Skill Training. He has received twelve certifications, including a ServSafe Certification and VCT Flooring Certification. While at Baskerville Correctional Center, Mr. Puryear worked outside the gate as a lead crew member. Mr. Puryear has never had a serious disciplinary infraction while incarcerated.

19. Mr. Puryear and his wife have four children who are eagerly waiting for his return. He has missed his son's high school graduation and his grandchild's birth, and he looks forward to being with them in the stable home situation that is waiting for him upon release. Mr. Puryear also looks forward to working when he is released, and the training he has received and discipline and work ethic he has displayed while incarcerated make him well-equipped to adapting to being released.

## CLAIM I

### Mr. Puryear's Continued Detention is Unlawful Because, Unless Explicitly Enumerated in § 53.1-202.3(A), Inchoate Offenses Are Eligible for Earned Sentence Credits

20. Each of the preceding paragraphs are incorporated and reiterated herein by reference. As set out in the accompanying Memorandum of Law in Support of this Petition (also incorporated by reference), attempted robbery is not disqualified from receiving expanded earned sentence credits under Va. Code Ann. § 53.1-202.3(B), because it is not specifically listed in Va. Code Ann. § 53.1-202.3(A). Based on the Virginia Supreme Court's decision in *Prease v. Clarke* and longstanding principles of statutory construction, Va. Code Ann. § 53.1-202.3(A) cannot be read to implicitly include the inchoate offense of attempted robbery. Therefore, Mr. Puryear is eligible to earn expanded earned sentence credits on his convictions.

21. Accordingly, this Court should find that VDOC must award Mr. Puryear the sentence credits he has earned under Va. Code Ann. § 8.01-654(A)(1). Doing so will result in Mr. Puryear having served his entire active sentence, rendering his continued detention "without lawful authority." Va. Code Ann. § 8.01-654(A)(1).

22. "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).

23. The VDOC’s erroneous interpretation and application of Va. Code Ann. § 53.1-202.3 directly impacts the duration of Mr. Puryear’s confinement, and a correction of that error would result in his immediate release. Thus, this Court should grant the relief requested herein.

### **PRAYER FOR RELIEF**

WHEREFORE, Petitioner Leslie L. Puryear moves this Court to grant him relief as follows:

- A. Order the VDOC to award him earned sentence credits as provided in Va. Code Ann. § 53.1-202.3(B) both prospectively and retroactively as to each of his sentences;
- B. Grant his petition for a writ of habeas corpus and order his immediate release; and
- C. Order any other relief as may be just and proper.

RESPECTFULLY SUBMITTED,

LESLIE L. PURYEAR

By Counsel:



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*\*Pro Hac Vice Pending*

CITY/COUNTY OF Lunenburg

The Petitioner being first duly sworn, says:

1. He has reviewed the foregoing petition for writ of habeas corpus.
2. The facts stated in the petition are true to the best of his information and belief.

[Handwritten Signature]

Signature of Petitioner

Subscribed and sworn to before me this 21st day of September, 2023.

[Handwritten Signature]

Notary Public

My commission expires 10/31/2027



# **EXHIBIT 1**

2011-2048

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PETERSBURG

FEDERAL INFORMATION PROCESSING  
STANDARDS CODE: 730

Hearing Date: MARCH 24, 2011

Judge: HONORABLE PAMELA S. BASKERVILL

COMMONWEALTH OF VIRGINIA

v.

LESLIE L. PURYEAR, DEFENDANT

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, **STVEN HANNA-APPOINTED**. The Commonwealth was represented by **CHERYL WILSON**.

On 01/31/2011 the defendant was found guilty of the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CR10-922	CONSPIRACY TO COMMIT ROBBERY (F)	04/26/2010	18.2-22
CR10-972	ACCESSORY AFTER THE FACT (M)	04/26/2010	18.2-32
CR10-973	BURGLARY (F)	04/26/2010	18.2-308.2
CR10-975	USE OF A FIRARM IN A FELONY (F)	04/26/2010	18.2-53.1
CR10-976	ATTEMPTED TO ROBBERY (F)	04/26/2010	18.2-58

The pre-sentence report was considered and is ordered filed as a part of the record in these cases in accordance with the provisions of Virginia Code §19.2-299.

Pursuant to the provisions of Virginia Code §19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guideline worksheets. The sentencing guideline worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in these cases.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration with the Virginia Department of Corrections for the term of: **TEN (10) YEARS** for **CONSPIRACY TO COMMIT ROBBERY (CR10-**

8/25/11

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4X



922), TWELVE (12) MONTHS for ACCESSORY AFTER THE FACT (CR10-972), THREE (3) YEARS for BURGLARY (CR10-973), TEN (10) YEARS for USE OF A FIREARM IN A FELONY (CR10-975), and FORTY (40) YEARS for ATTEMPTED ROBBERY (CR10-976). The total sentence imposed is SIXTY THREE (63) YEARS AND TWELVE (12) MONTHS.

This sentence shall run consecutively with all other sentences.

The Court SUSPENDS TEN (10) YEARS of the CONSPIRACY TO COMMIT ROBBERY (CR10-922) sentence, TWELVE (12) MONTHS of the ACCESSORY AFTER THE FACT (CR10-972) sentence, TEN (10) YEARS of the USE OF A FIREARM IN A FELONY (CR10-975) sentence, THIRTY FIVE (35) YEARS for ATTEMPTED ROBBERY (CR10-976), for a total suspension of FIFTY FIVE (55) YEARS AND TWELVE (12) MONTHS, upon the following condition(s):

**Good behavior.** The defendant shall be of good behavior for LIFE for the CONSPIRACY TO COMMIT ROBBERY (CR10-922) sentence, LIFE for the ACCESSORY AFTER THE FACT (CR10-972) sentence, LIFE for the USE OF A FIREARM IN A FELONY (CR10-975) sentence, LIFE for the ATTEMPTED ROBBERY (CR10-976).

**Supervised probation.** The defendant is placed on probation to commence on his release from incarceration, under the supervision of a Probation Officer for AN INDEFINITE AMOUNT OF TIME, or unless sooner released by the court or by the Probation Officer. The defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include substance abuse counseling and/or testing as prescribed by the Probation Officer.

**Costs.** The defendant shall pay costs of \$4924.79.

**Credit for time served.** The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code §53.1-187.

In addition, the defendant is ORDERED to report to the Petersburg City Jail with proof of identity for the purposes of withdrawal of blood samples as required by this Order.

It is further Ordered that, pursuant to Section 18.2-259.1 and Section 46.2-398, of the Code of Virginia, as amended, the defendant's privilege to operate a motor vehicle, engine, or train in the Commonwealth of Virginia is hereby suspended for a period of six (6) months, and that the defendant is ORDERED to surrender his driver's license to be disposed of in accordance with the section

46.2-398, and the Clerk is directed to forward a copy of this order to the Commissioner of the Department of Motor Vehicles. The defendant's address is 2400 OAKLAWN BOULEVARD HOPEWELL, VIRGINIA 23860

03/24/2011

8/24/11  
DATE

ENTER: James P. Bashaw  
JUDGE

**DEFENDANT IDENTIFICATION:**

Alias: NONE

SSN: 225-41-5052

DOB: 03/15/1986

Sex: M

**SENTENCING SUMMARY:**

TOTAL SENTENCE IMPOSED: SIXTY THREE (63) YEARS AND TWELVE (12) MONTHS

TOTAL SENTENCE SUSPENDED: FIFTY FIVE (55) YEARS AND TWELVE (12) MONTHS

# **EXHIBIT 2**



# Virginia Department of Corrections

## Offender Management and Programs

### Operating Procedure 830.3

#### *Good Time Awards*

#### **Authority:**

Directive 830, *Classification Management*

**Effective Date:** July 1, 2022

**Amended:** 9/1/22, 1/1/23, 6/1/23

#### **Supersedes:**

Operating Procedure 830.3, March 1, 2019

**Access:**  Restricted  Public  Inmate

**ACA/PREA Standards:** 5-ACI-1E-03, 5-ACI-5B-03, 5-ACI-7A-13; 2-CO-1E-05; 2-CI-4A-8; §115.78

<b>Content Owner:</b>	James Parks Director of Offender Management Services	<i>Signature Copy on File</i>	5/25/22
		Signature	Date
<b>Reviewer:</b>	Jermiah Fitz, Jr. Corrections Operations Administrator	<i>Signature Copy on File</i>	5/26/22
		Signature	Date
<b>Signatory:</b>	A. David Robinson Chief of Corrections Operations	<i>Signature Copy on File</i>	5/26/22
		Signature	Date

### REVIEW

The Content Owner will review this operating procedure annually and re-write it no later than three years after the effective date.

### COMPLIANCE

This operating procedure applies to all units operated by the Virginia Department of Corrections. Practices and procedures must comply with applicable State and Federal laws and regulations, ACA standards, PREA standards, and DOC directives and operating procedures.

## Table of Contents

DEFINITIONS .....	3
PURPOSE .....	5
PROCEDURE .....	5
I.    Good Time Awards .....	5
II.   Class Level Evaluation Procedures .....	6
III.  Class Level Evaluations .....	8
IV.  Good Conduct Time (GCT) System.....	11
V.    Good Conduct Allowance (GCA) .....	12
VI.  Earned Sentence Credit (ESC) .....	13
VII.  Initial Administrative Assignment of Class Level .....	13
VIII. Class Level Reviews .....	14
IX.  Criteria and Restrictions for Special Status Inmates: .....	15
X.    Sentence Reduction.....	16
REFERENCES.....	19
ATTACHMENTS .....	19
FORM CITATIONS .....	19



## DEFINITIONS

**Annual Review** - A uniform yearly review of an inmate's classification, needs, and objectives. The Initial Classification Date (ICD) is used to establish the review date for an inmate received on or after February 1, 2006. The Custody Responsibility Date (CRD) is used to establish the review date for an inmate received prior to February 1, 2006.

**Case Management Review** - An action taken to document the specific processes completed during an inmate's annual review.

**Custody Responsibility Date (CRD)** - The date on which an inmate becomes state responsible whether located in a jail or a DOC institution.

**Earned Sentence Credit (ESC)** - Time earned in accordance with COV §53.1-202.3, *Rate at which sentence credits may be earned; prerequisites*, in one of four levels with rates ranging from 0 to 4.5 days earned per 30 days served for ESC-1 or 0 to 15 days earned per 30 days served for ESC-2, which will be applied to reduce the inmate's maximum term of incarceration. ESC-1 and ESC-2 apply to those inmates whose felony offenses were committed on or after January 1, 1995.

**Extraordinary Good Time (EGT)** - Time earned in accordance with COV §53.1-197, *Credit allowed for career and technical educational or other educational training* at a rate ranging from 1 to 5 days earned per month served for those inmates whose offenses were committed prior to July 1, 1981, who do not elect to participate in the Good Conduct Allowance System (GCA). All such time earned will reduce the term of imprisonment from which parole eligibility is computed.

**Good Conduct Allowance (GCA)** - Time earned in accordance with COV §53.1-198, *Certain persons to choose good conduct system* to COV §53.1-202.1, *Limitation upon applicability of this article* in one of four classes with rates ranging from 0 to 30 days earned per 30 days served which will be applied to reduce the inmate's maximum term of imprisonment. GCA applies to those inmates whose felony offenses were committed on or after July 1, 1981 and before January 1, 1995 or who have opted into GCA from GCT. Misdemeanor convictions committed on or after July 1, 1981, will continue to be calculated under the GCA System. One-half of the credit should be applied to reduce the parole eligibility date. Misdemeanor convictions committed after July 1, 2008 are not eligible for parole in accordance with COV §53.1-153, *Eligibility of persons sentenced to jails for more than twelve months*.

**Good Conduct Time (GCT)** - Time earned in accordance with COV §53.1-196, *Good conduct credits of persons convicted after October 1, 1942; effect of credit upon eligibility for parole* at a constant rate of 10 days earned per 20 days served only by those inmates whose offenses were committed prior to July 1, 1981, who do not opt to participate in the Good Conduct Allowance (GCA) system. All such time earned will reduce the term of imprisonment from which parole eligibility is computed.

**ICA Hearing** - An inmate case review conducted by the Institutional Classification Authority or Multi-disciplinary Team; these hearings may be either formal due process or informal hearings depending on the purpose of the review

**Initial Classification Date (ICD)** - The date on which the inmate was initially assigned to a security level.

**Inmate** - A person who is incarcerated in a Virginia Department of Corrections facility or who is Virginia Department of Corrections responsible to serve a state sentence.

**Institutional Classification Authority (ICA)** - The institutional employee designated to conduct inmate case review hearings.

**Interim Review** - A review of an inmate's good time earning level that covers the last 12 month period and is conducted at a time prior to the inmate's next scheduled annual review.

**Override** - Assignment to an earning level that is either higher or lower than indicated by the Class Level score.

**Restorative Housing Unit** - A general term for special purpose bed assignments including general detention, restorative housing, and step-down statuses; usually a housing unit or area separated from full privilege general population.

- **Restorative Housing (RHU)** - Special purpose bed assignments operated under maximum security regulations

and procedures, and utilized under proper administrative process, for the personal protection or custodial management of inmates.

- **RH Step-Down 1 (SD-1), RH Step-Down 2 (SD-2)** - General population bed assignments operated with increased privileges above restorative housing but more control than full privilege general population.

**Sentence Reduction** - A specific amount of time credited to an inmate's sentence in cases of injuries to or extraordinary services performed by the inmate.

**Sentence Reduction Review Committee** - A committee appointed by the Chief of Corrections Operations to meet as needed to review sentence reduction recommendations.

**Unclassified Inmate** - New intakes into the Department of Corrections (DOC) who do not have a Custody Responsibility Date (CRD) and Parole Violators before their revocation date.

**Voluntary Substance Use Disorder Treatment (V-SUDT)**- A voluntary substance use disorder program for inmates who used or possessed drugs or alcohol for their own use within 30-days prior to the request for admission.

## PURPOSE

This operating procedure establishes a process for administering good time awards to inmates housed in Department of Corrections (DOC) institutions or local jails and provides guidance for submitting and reviewing recommendations for a sentence reduction for inmates housed in institutions.

## PROCEDURE

### I. Good Time Awards

#### A. All inmates are eligible for recognition under one or more of the following good time award systems:

1. Good Conduct Time (GCT) applies to those inmates whose offenses were committed prior to July 1, 1981, and who do not opt to participate in the Good Conduct Allowance (GCA) system.
  - a. Inmates under the GCT system are awarded good time at a constant rate of 10 days earned per 20 days served.
  - b. Based on evaluations of inmate behavior and performance, inmates under the GCT system can earn additional Extraordinary Good Time (EGT) at a rate ranging from 1 to 5 days earned per month served.
2. GCA applies to those inmates whose offenses were committed on or after July 1, 1981 and felony offenses before January 1, 1995.
  - a. Inmates under GCT also have the opportunity to opt into the GCA system.
  - b. Inmates under the GCA system are awarded from 0 to 30 days of good time for each 30 days served.
3. Earned Sentence Credit (ESC) applies those inmates whose felony offenses were committed on or after January 1, 1995.
  - a. Inmates under the ESC-1 system are awarded from 0 to 4.5 days of good time for each 30 days served based on evaluations of inmate behavior and performance.
  - b. Inmates under the ESC-2 system are awarded from 0 to 15 days of good time for each 30 days served, based on evaluations of inmate behavior and performance.

#### B. Loss of Good Time and Restoration of Lost Good Time

##### 1. Loss of Good Time

- a. Inmates convicted of specific disciplinary offenses may be subject to a loss of good time up to and including all accumulated GCA, ESC-1, and ESC-2 earnings.
  - i. A loss of 30 days GCA is equivalent to a loss of 4.5 days of ESC-1 and 15 days of ESC-2.
  - ii. Staff should impose the loss of good time in increments of GCA earnings.
  - iii. The loss of GCA, ESC-1 and ESC-2 earnings is computed automatically upon the inmate's disciplinary conviction.
- b. The loss of good time does not apply to GCT sentences, conviction of any disciplinary offense can prevent a GCT sentence from earning 10 days for the 20 days served and the inmate may be ineligible for EGT.
- c. The Chief of Corrections Operations must review and approve any disciplinary penalty for loss of earnings in excess of 180 days GCA, 27 days ESC-1 and 90 days ESC-2.

##### 2. Restoration of Lost Good Time

- a. An inmate can only request a restoration of their lost good time for the following disciplinary convictions:
  - i. Offense Code 116a, *Refusal to provide sample for DNA analysis (First Refusal)*
  - ii. Offense Code 116b, *Refusal to provide sample for DNA analysis (Second Refusal)*
  - iii. Offense Code 116c, *Refusal to provide sample for DNA analysis (Third and Subsequent Refusals)*
  - iv. Offense Code 119a, *Refusal to participate in testing, classification, or reentry preparation -*



*Preventative/prophylactic therapies and/or treatment for contagious diseases which are determined by the medical authority or state/federal law or regulation to present a public health risk.*

- b. After the inmate complies with the requirement that resulted in the disciplinary conviction for Offense Codes 116a, 116b, 116c, and 119a, the inmate must submit a request for good time restoration to their Counselor.
- c. The Counselor will review the circumstances of the inmate's refusal and subsequent compliance and will schedule a formal ICA hearing in VACORIS to review the inmate for good time restoration; see Operating Procedure 830.1, *Inmate Classification Management*.
- d. The Counselor must notify CCS and Court and Legal Services to update the inmate's time calculation.
- e. The Counselor will print a copy of the *Institutional Classification Authority Hearing* report showing final approval or disapproval of the ICA action and provide it to the inmate.
- f. Any inmate not satisfied with the good time restoration decision can address their concerns through the *Offender Grievance Procedure*; see Operating Procedure 866.1, *Offender Grievance Procedure*.

## II. Class Level Evaluation Procedures

### A. Class Level Advancement

1. Advancement of an inmate's Class Level should occur only by action of the ICA with approval of the Facility Unit Head; see Operating Procedure 830.1, *Institution Classification Management*.
2. The ICA may review an inmate's Class Level for advancement:
  - a. During the inmate's annual review
  - b. During an interim review conducted by administrative request once appropriate staff has screened the request for advancement and recommended an ICA review due to significant progress noted in one or more area of evaluation.

### B. Class Level Reduction

1. Reduction of an inmate's Class Level will occur only by:
  - a. ICA action with approval of the Facility Unit Head; see Operating Procedure 830.1, *Institution Classification Management*
  - b. An inmate's special status; see the *Criteria and Restrictions for Special Status Inmates* section of this operating procedure.
2. The ICA may review an inmate's Class Level for reduction:
  - a. During the inmate's annual review
  - b. Upon receipt of a referral from the Hearings Officer based on one or more disciplinary infractions
  - c. Upon an administrative request for review after appropriate staff note significant decline in one or more areas of evaluation.

### C. Regardless of the type of Class Level review, clear justification should be required to advance or reduce an inmate's Class Level based on:

1. A significant improvement in the inmate's evaluations in any area of performance and responsibility related as indicated by the appropriate Class Level point range or a recommended override, or a significant decline in any area of performance and responsibility where the inmate has clearly failed to maintain the behaviors that advanced them to their present Class Level.
2. The criteria and restrictions that affect the inmate in an administrative placement, special status, or with special needs as set forth in this operating procedure.
3. Input of the inmate's counselor, work supervisor, building officer, and other staff knowledgeable of

the inmate's progress towards attainment of treatment objectives on the inmate's *Re-entry Plan*. (5-ACI-5B-03) See Operating Procedure 820.2, *Inmate Re-entry Planning*.

D. Staff must complete good time award evaluations based on the inmate's performance during the entire preceding year in the areas of performance and responsibility as follows:

1. Infractions - 0-40 points available; see Operating Procedure 861.1, *Offender Discipline, Institutions*
  - a. A maximum score of 40 points will be awarded to inmates with no disciplinary convictions
  - b. Deduct 40 points (award 0 points) for any conviction of offenses numbered 100 through 108.
  - c. Deduct 20 points for each conviction of other Category I (100 series) offenses.
  - d. Deduct 10 points for each conviction of Category II (200 series) offenses.
2. Re-entry Plan, Annual Goals - 0-40 points available; see Operating Procedure 820.2, *Inmate Re-entry Planning*
  - a. Award points based on the inmate's achievement of goals established at the beginning of the review year in one or more of the following areas:
    - i. Educational
    - ii. Program
    - iii. Vocational
    - iv. Other
  - b. Goals should be achievable in the inmate's current situation, related to identified criminogenic factors, and represent progress toward the inmate's Re-entry Preparation Goals.
  - c. Points should be allocated based on the number of goals set for the year i.e., for two goals - up to 20 points could be awarded for achievement of each goal.
  - d. Staff should recognize inmates for making reasonable efforts to achieve their goals.
3. Work - 0-20 points available (5-ACI-7A-13; 2-CI-4A-8)

The score for work should be prorated based on the percentage of the year that the inmate was employed.
4. VACORIS provides a tentative point score based on the inmate's current disciplinary convictions, progress toward re-entry plan goals, and work assignment.
  - a. Counselors should not penalize to include lowering an inmate's classification level due to the unavailability of educational, program, vocational, or work opportunities if the inmate can document consistent, reasonable efforts to achieve the goal.
  - b. Counselors should not award inmates for lack of consistent, reasonable efforts even though they may be meeting the goal at the time of the review.
  - c. Counselors should consider, either through point scores or through use of an override, the impact of changed goals or the achievement of goals on inmates who moved from one institution to another during the year.
    - i. The Counselor and the ICA may adjust tentative point scores or recommend overrides as needed to reflect accurately the inmate's overall performance and progress for the entire review period.
    - ii. The Counselor or ICA should justify and document each adjustment or override in the "Comments" section of the *Class Level Evaluation*; see Attachment 1 for sample.

E. Mitigating Factors

1. Staff should consider additional criteria for inmates who, because of medical needs or limitations, mental health needs or limitations, or other special treatment needs or limitations, cannot be evaluated appropriately solely in the areas of performance and responsibility as set forth in this operating procedure.
2. An inmate, who cannot be evaluated properly due to their needs or limitations, should be placed in a Class Level based on the areas of performance and responsibility, which would not penalize the inmate

due to their special need or limitation.

3. When an inmate cannot participate in a work, vocational or educational program due to medical considerations, the inmate's Class Level should be determined as follows:
  - a. Staff should incorporate any treatment or therapy program prescribed by attending health care staff into the inmate's *Re-entry Plan, Annual Goals*, which are subject to review for Class Level purposes.
  - b. Staff may assign a score of 17 points on the *Class Level Evaluation* in the area of work.
4. When an inmate cannot participate in a work, vocational or educational program assignment due to mental health or other special treatment considerations, the inmate's Class Level should be determined as follows:
  - a. Staff should incorporate any treatment or therapy programs prescribed by attending psychologists, psychiatrists or other special treatment staff into the inmate's *Re-entry Plan, Annual Goals*, which are subject to review for Class Level purposes.
  - b. Staff may assign a score of 17 points to the *Class Level Evaluation* in the area of work.
  - c. These requirements may apply to an inmate assigned to a mental health acute care unit; see Operating Procedure 730.3, *Mental Health Services: Levels of Service*.
  - d. Staff should consider the class level of any inmate returning to a correctional institution from a non-DOC mental health facility at the inmate's next annual review. The ICA should review the inmate's suitability for a class level based on psychological progress reports during the transfer period and the inmate's institutional adjustment.

### III. Class Level Evaluations

- A. Counselors should determine the appropriate Class Level based on the total points scored by the inmate on the *Class Level Evaluation* in VACORIS. Class Level point ranges are as follows:
  1. Class Level I           85 to 100 points
  2. Class Level II         65 to 84 points
  3. Class Level III        45 to 64 point
  4. Class Level IV        44 points or below
- B. Prior to the inmate's annual or interim review, the Counselor should review the inmate's point score in VACORIS and determine if the inmate is currently in the appropriate Class Level.
  1. When the Counselor determines at the inmate's annual review that the inmate is currently in the appropriate Class Level, the Counselor should document in VACORIS that they recommend no change to the inmate's Class Level, subject to ICA action and Facility Unit Head review.
  2. When the Counselor determines a the inmate's annual review that the inmate is not currently in the appropriate Class Level at their annual review, the Counselor should complete the *Class Level Evaluation* in VACORIS to change the inmate's Class Level which is subject to ICA action and Facility Unit Head review.
  3. The Counselor will document their review of the inmate's Class Level during the inmate's annual review on the *Case Management Review Checklist* in the *Facility Supervision* section of VACORIS.
- C. For a change in Class Level, staff must conduct an ICA hearing so the ICA can consider the appropriate Class Level assignment; see Operating Procedure 830.1, *Institution Classification Management*.
  1. The ICA should review the point score and any supporting documentation to ensure proper scoring and to determine if an override is necessary to place the inmate in the appropriate Class Level.
  2. The ICA should record the recommended Class Level and any override required in VACORIS.
  3. For annual review changes in Class Level, the effective date for the change should be the anniversary of the ICD or CRD, as applicable.

- D. Staff can reject an inmate's Class Level point score and subsequent Class Level assignment based on one or more of the approved overrides listed below.

Override	Override Reason
#1	A point score in one area of evaluation is inordinately high or low affecting the Class Level
#2	Seriousness or number of institutional infractions warrants a lower Class Level.
#3	A significant recent decrease in an area of evaluation warrants a lower Class Level.
#4	Extraordinary improvement in one or more areas of evaluation warrants a higher Class Level.
#5	Lack of program availability inordinately affects Class Level.
#6	More information needed (i.e. under investigation, longer period of adjustment needed).
#7	Refusal of or removal from any required educational, program, vocational, or work assignment must result in an automatic override to Class Level IV.
#P	Inmate has reentered all required educational, program, vocational, or work assignments that resulted in the use of override #7

1. Staff will use overrides #7 and #P to place an inmate in the Class Level IV, upon their conviction of one of the applicable disciplinary offenses listed below, when an inmate:
  - a. Refuses to comply with COV §19.2-310.2, *Blood, saliva, or tissue sample required for DNA analysis upon conviction of certain crimes*; fee by refusing to provide a DNA sample. Staff will charge the inmate with the appropriate Offense Code 116, *Refusal to provide sample for DNA analysis*; see DNA Sampling attachments to Operating Procedure 920.1, *Community Case Opening, Supervision, and Transfer*.
  - b. Refuses to participate in any part of an initial or annual screening for TB, or chest x-ray if ordered. Staff will charge the inmate with Offense Code 119a, *Refusal to participate in testing, classification, or reentry preparation violation, Preventative/prophylactic therapies and/or treatment for contagious diseases which are determined by the medical authority or state/federal law or regulation to present a public health risk*; see Operating Procedure 740.1, *Infectious Disease Control*.
  - c. Refuses to take the TABE and/or HSE Practice Test. Staff will charge the inmate with Offense Code 119b, *Diagnostic, educational, psychological, or other required evaluation*; see Operating Procedure 601.4, *Educational Testing*.
  - d. Refuses to obtain their official birth certificate or refuse to make a reasonable effort. Staff will charge the inmate with Offense Code 119c, *Refusal to participate in reentry planning or preparation, or removal from a reentry program*; see Operating Procedure 820.2, *Inmate Re-entry Planning*.
  - e. Refuses to obtain a DMV Identification Card or refuses to complete the *Registration Form* for Selective Service registration. Staff will charge the inmate with Offense Code 119c, *Refusal to participate in reentry planning or preparation, or removal from a reentry program*; see Operating Procedure 820.2, *Inmate Re-entry Planning*.
  - f. Refuses to comply with the Sex Offender and Crimes against Minor's registration requirements. Staff will charge the inmate with offense code 119d, *Refusal to participate in required sex offender/crimes against minors registration*; see Operating Procedure 735.1, *Sex Offender and Crimes against Minors Registration*,
  - g. Refuses to participate in a voluntary (non-reentry) program after transfer is scheduled, refuses to participate in the program after transfer is complete, or is removed due to disruptive, non-participatory, or non-compliant behavior. Staff will charge the inmate with Offense Code 200b, *Refusal to participate in or removal from any voluntary (non-reentry) program*; see Operating Procedure 841.5, *Inmate and Probationer/Parolee Substance Use Testing and Treatment Services*.
  - h. Does not comply with the requirements to participate in or is removed from a residential cognitive community program for non-compliant or disruptive behavior. Staff will charge the inmate with Offense code 119e, *Refusal to participate in or removal from a residential cognitive community program*; see Operating Procedure 841.1, *Inmate Programs*.

- i. Enroll in or attend, or is removed due to disruptive, non-participatory, or non-compliant behaviors, from any educational, program, vocational, or work assignment required on the inmate's *Re-entry Plan*. Staff will charge the inmate with Offense Code 200, *Refusing to work or refusing to attend school or other program assignments mandated by procedure or by law, or failure to perform work or program assignment as instructed*.
    - j. Does not comply when identified as a High Risk Sexual Aggressor (HRSA) with therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse. Staff will charge the inmate with Offense Code 200, *Refusing to work or refusing to attend school or other program assignments mandated by procedure or by law, or failure to perform work or program assignment as instructed*; see Operating Procedure 735.2, *Sex Offender Treatment Services (Institutions)*. (§115.78[d])
  2. Upon conviction of the disciplinary offense, staff must refer the inmate to the ICA who will conduct an ICA hearing and place the inmate in Class Level IV effective the date staff wrote the *Disciplinary Offense Report*.
    - a. Staff must use override #7 regardless of the inmate's Class Level score.
    - b. The override #7 will flag the inmate's file so that the inmate does not earn good time until meeting the specified requirements.
    - c. Staff may use the override #7 for Class Level reviews related to enhanced penalties for repeated violations of Category I offenses such as Offense Code 116 or 119, not allowing an inmate to earn good time for a period in excess of one year or until the inmate complies with some requirement.
    - d. Staff will use the override #7 for Class Level reviews related to inmates convicted of Offense Code 200b, the inmate will not be eligible to earn good time for a period of two years.
  3. Once staff determine an inmate is sincere and actively participating in the specified requirement, the staff member should refer the inmate to the ICA for an ICA hearing to review the inmate's Class Level. Time spent on a waiting list does not count as participation.
    - a. As an incentive, staff may review inmate's participating in an Intensive Re-entry Cognitive Community program who are in Class Level IV due to removal from a Cognitive Therapeutic Community, for an advancement in their Class Level.
      - i. Inmates assigned to an Intensive Re-entry Cognitive Community can receive a good time Class Level review at 90 days in the program.
      - ii. At the discretion of staff, an inmate who has adequately participated for a minimum of 90 consecutive day period can advance to the appropriate Class Level effective the date they entered into the Cognitive Community.
        - (a) The inmate's good time Class Level can advance one level, only.
        - (b) The effective date of the Class Level change must be at six months or less, prior to the inmate's Good Time Release Date (GTRD).
        - (c) Staff must submit the Class Level change no more than 90 days and no less than 60 days, prior to the inmate's release.
        - (d) Staff may utilize an inmate's adjusted days to allow adequate time to process the inmate's release.
      - iii. Once an inmate advances to a higher Class Level, staff will monitor the inmate to determine if the inmate's behavior continues to warrant the current Class Level or if they need to adjust the inmate's Class Level at any time for non-compliant behavior or disciplinary convictions.
      - iv. Any inmate removed from the Intensive Re-entry Cognitive Community will forfeit any good time awarded under this provision.
    - b. Staff must use an override #P to move an inmate out of Class Level IV when an override #7 reduced the inmate to Class Level IV. Any change in good time Class Level should be retroactive to the date the inmate met the specified requirement.
  4. All overrides must be justified with override numbers and supporting comments noted on VACORIS.
- E. VACORIS will generate a notification to the Facility Unit Head to review the ICA's action and approve

or disapprove it.

1. An inmate's Class Level will be changed with Facility Unit Head approval of ICA action in VACORIS only.
  2. Staff will print a copy of the *Class Level Evaluation* or *Institutional Classification Authority Hearing* report showing Facility Unit Head approval or disapproval of the ICA action and provide it to the inmate.
  3. Facility Unit Head approval of ICA action to change an inmate's Class Level will generate a notification in VACORIS to Court and Legal Services staff to update the inmate's time calculation.
- F. Staff should not change an inmate's Class Level and award EGT when an inmate is within 60 days of their expected discharge date.

#### IV. Good Conduct Time (GCT) System

A. To be eligible for the GCT System and EGT, an inmate must:

1. Have committed their offense prior to July 1, 1981
2. Have not elected to enter the GCA system

B. Inmates under the GCT system are awarded GCT at the rate of 10 days per 20 days served.

C. Extraordinary Good Time (EGT) Eligibility and Restrictions

1. In addition to GCT, the ICA can make an EGT award of from 1 to 5 days per month served as determined by the inmate's Class Level on the *Class Level Evaluation*. The Class Level will also be used for recognition purposes.
2. After staff complete a *Class Level Evaluation* for assignment to Class Level I in VACORIS and only by action of the ICA with approval of the Facility Unit Head will an inmate be awarded EGT.
3. The ICA should review an inmate for EGT eligibility based on their annual review date.
  - a. The ICA will certify the inmate is eligible for EGT after review of the inmate's performance during the previous 12 months and will recommend at what rate EGT should be awarded to the inmate.
  - b. The ICA should record the recommended EGT award in VACORIS.
  - c. Staff are required to provide clear justification to award EGT to an inmate taking into consideration:
    - i. The inmate's total point score on the *Class Level Evaluation*
    - ii. Any criteria and restrictions that affect the inmate in an administrative placement, special status or with special needs as set forth in this operating procedure
    - iii. Input of the inmate's counselor, work supervisor, building officer, and other staff knowledgeable of the inmate's progress towards attainment of treatment objectives in the inmate's *Re-entry Plan*.
4. VACORIS will generate a notification to the Facility Unit Head to review the ICA action and approve or disapprove it. The Facility Unit Head may
  - a. Approve the EGT request in total
  - b. Approve the EGT with a reduction in the rate and/or total days EGT
  - c. Disapprove the request in total
5. Staff should print the *Class Level Evaluation* showing Facility Unit Head approval or disapproval of the ICA action from VACORIS and provide it to the inmate.
6. Facility Unit Head approval of ICA action will generate a notification to Court and Legal Services to update the inmate's time calculation.
7. Once VACORIS credits the EGT to an inmate, the loss of EGT awards are not available as a disciplinary penalty.

**D. Criteria and Restrictions for Special Status Inmates:****1. Parole Violations**

- a. Upon return to confinement for alleged parole violation(s), an inmate's eligibility for EGT should not resume until the Parole Board revokes the inmate's parole.
- b. At the time of an inmate's revocation, EGT consideration for the inmate will be retroactive to the date of the inmate's return to a local jail facility or an institution in the absence of any new conviction related to the revocation.
- c. Upon transfer to a local jail facility, the inmate's EGT eligibility status should not be affected.

**2. Commission of a Felony or Misdemeanor**

- a. Any inmate who commits a felony or misdemeanor while in confinement or in parole revocation status automatically becomes ineligible for EGT.
- b. The inmate's eligibility for EGT award consideration resumes at the next annual review cycle following the inmate's conviction of the offense.

**3. Escape**

- a. Any escapee returned to confinement automatically becomes ineligible for EGT.
- b. The inmate's eligibility should resume the next annual review cycle following the inmate's conviction of the offense.

**4. Restorative Housing**

- a. Upon assignment to a Restorative Housing Unit for behavioral management, the inmate will not be eligible for EGT beginning the month this assignment begins. Eligibility for EGT consideration will resume the next annual review cycle date following the inmate's release from restorative housing status.
- b. Upon assignment to the Restorative Housing Unit on general detention for protective custody, the inmate should be eligible for EGT if:
  - i. The inmate is complying with their *Re-entry Plan, Annual Goals* and has an institutional work assignment.
  - ii. The inmate scores in point range for Class Level I on their *Class Level Evaluation*.
- c. When an inmate assigned to the Restorative Housing Unit on general detention has also received a disciplinary offense, staff should suspend the inmate's eligibility for EGT until the Hearings Officer has conducted the disciplinary hearing and rendered a decision on innocence or guilt and the Facility Unit Head or designee has approved the decision.
  - i. If the inmate is convicted of a 100 series disciplinary offense, the inmates eligibility for EGT consideration resumes the next annual review cycle date following conviction of the offense.
  - ii. If the inmate is not convicted of a 100 series disciplinary offense, the inmate's EGT eligibility is unaffected by the assignment to general detention.

**V. Good Conduct Allowance (GCA)**

**A. Inmates who committed their felony offenses on or after July 1, 1981 but prior to January 1, 1995 automatically enter the GCA system for the duration of all such felony sentences.**

1. There are four Class Levels in the GCA system; the amount of GCA awarded per 30 day period served is based on the inmate's assigned Class Level as follows
  - a. Class Level I - Inmate earns 30 days GCA for every 30 days served.
  - b. Class Level II - Inmate earns 20 days GCA for every 30 days served.
  - c. Class Level III - Inmate earns 10 days GCA for every 30 days served.
  - d. Class Level IV - Inmate earns no days GCA.
2. The entire GCA earned reduces the time the inmate must serve to satisfy the sentence.
3. One-half of the GCA earned reduces the inmate's discretionary parole eligibility date (DPED).



- B. Those inmates who committed their offense prior to July 1, 1981 may request to enter the GCA system by action of the ICA with approval of the Facility Unit Head; see Operating Procedure 830.1, *Institution Classification Management*. For these inmates:
1. Entrance into the GCA system may take place only after:
    - a. Appropriate staff explains the GCA system to the inmate
    - b. The inmate understands that the decision to enter the GCA system cannot later be reversed
    - c. The inmate signs a *Good Conduct Allowance Opt-In 830\_F3* indicating their understanding of the GCA system and documenting their informed consent
  2. If appropriate staff determine that an inmate is not capable of making an informed decision on entry into the GCA system due to their mental health condition or other limitations, the Facility Unit Head or designee is responsible for referring the inmate to court-appointed or other appropriate legal counsel to facilitate an informed decision.
  3. The effective date of entry into the GCA system is the date the inmate signed the *Good Conduct Allowance Opt-In 830\_F3*.
  4. The ICA, with the approval of the Facility Unit Head, will determine the inmate's GCA Class Level at entry into the system in accordance with the evaluation and scoring process provided in this operating procedure.
- C. Inmates who committed misdemeanor offenses on or after July 1, 1981 will automatically enter the GCA system for the duration of those misdemeanor sentences.
- D. Inmates serving one or more life sentences or sentences for certain violent offenses will not exceed the earning rate of the GCA Class Level III on those sentences.

#### VI. Earned Sentence Credit (ESC)

- A. Inmates who committed their felony offense(s) on or after January 1, 1995, automatically enter the ESC system for the duration of all such felony sentences.
- B. Whether an inmate is awarded good time under ESC-1 or ESC-2 is determined by the offense or underlining offense as outlined in COV §53.1-202.3 A:1-17 and B, *Rate at which sentence credits may be earned; prerequisites*. Any sentence or portion of a sentence imposed with an offense enumerated in COV §53.1-202.3 A, will limit all earned sentence credit sentences, being served or to be served, to a maximum of 4.5 days per 30 days served.
1. There are four Class Levels in the ESC-1 system; the amount of ESC-1 awarded per 30 day period served is based on the inmate's assigned Class Level as follows:
    - a. Class Level I - Inmate earns 4.5 days ESC-1 for every 30 days served.
    - b. Class Level II - Inmate earns 3 days ESC-1 for every 30 days served.
    - c. Class Level III - Inmate earns 1.5 days ESC-1 for every 30 days served.
    - d. Class Level IV - Inmate earns 0 days ESC-1.
  2. There are four Class Levels in the ESC-2 system; the amount of ESC-2 awarded per 30 day period served is based on the inmate's assigned Class Level as follows:
    - a. Class Level I - Inmate earns 15 days ESC-2 for every 30 days served.
    - b. Class Level II - Inmate earns 7.5 days ESC-2 for every 30 days served.
    - c. Class Level III - Inmate earns 3.5 days ESC-2 for every 30 days served.
    - d. Class Level IV - Inmate earns 0 days ESC-2.
  3. The entire ESC reduces the time the inmate must serve to satisfy the sentence.
- C. Inmates serving one or more life sentences are not eligible to earn ESC, but staff should award Class Levels L-I, L-II, L-III or L-IV for recognition purposes.



D. Misdemeanor sentences are calculated under GCA.

E. No ESC earned can be applied to reduce the DPED or mandatory parole eligibility date (MPRD).

#### VII. Initial Administrative Assignment of Class Level

A. Unclassified inmates are awarded good time at the rate of 15 days for each 30 days served on parole eligible sentences under GCT or GCA and at the rate of 2.25 days for each 30 days served on sentences under ESC-1 and ESC-2. For work or program participation, jail staff can award unclassified inmates an additional 5 days good time (a maximum of 2.25 days applied for ESC-1 and 5 days applied for ESC-2) per 30 days served prior to their CRD.

B. Staff will administratively assign new intakes to Class Level I on their CRD.

1. The inmate will begin to receive good time awards at the Class Level I rate.

2. Inmates received prior to January 1, 2003 were administratively assigned to Class Level II at the time of the inmate's initial sentence computation.

C. Staff will administratively assign Parole Violators to Class Level II on their parole revocation date.

1. Parole Violators will receive good time awards at the Class Level II rate.

2. Parole Violators are not eligible for assignment to Class Level I for 12 months.

D. Initial Class Level I or II Assignment Exceptions:

1. Any inmate convicted of certain violent offenses or sentenced to life imprisonment under GCA will not earn at a rate higher than GCA Class Level III on related sentences.

2. Inmates sentenced to life imprisonment under ESC will not earn good time.

#### VIII. Class Level Reviews

A. When an inmate is convicted of a disciplinary offense during the reception and classification process or the inmate's jail records document disciplinary problems at a local jail facility while the inmate was awaiting transfer to a DOC institution, staff may consider the severity of the infraction(s) and reduce the inmate's initial administrative Class Level.

1. Staff should conduct a formal due process ICA hearing; see Operating Procedure 830.1, *Institution Classification Management*.

2. The effective date of the Class Level reduction should be the date the inmate physically arrived at the institution for any offense that occurred in the jail and the actual date of the offense for any offense that occurred in the institution.

B. If an inmate who refuses to comply with the DOC intake and initial classification process, staff must conduct a formal ICA hearing and reduce the inmate to a Class Level IV.

1. The inmate will remain Class Level IV until the intake and initial classification process been completed.

2. Upon confirmation of compliance, the ICA should administratively review the inmate for the appropriate Class Level assignment effective on the date the process was completed.

C. Staff should review each inmate's Class Level during the inmate's annual review; see Operating Procedure 830.1, *Institution Classification Management*.

1. Staff will conduct an inmate's annual review within 30 days after the anniversary of the inmate's Initial Classification Date (ICD); i.e. first assigned a Security Level.

2. Inmates who have had one or more annual reviews based on their CRD will continue to have annual reviews based on the CRD.

D. Staff may administratively review an inmate's Class Level any time it appears the inmate is no longer



eligible or suitable for their current Class Level.

- E. Staff must properly conduct and document each Class Level review so the inmate's time is accurately computed and recorded in conformance with applicable statutes and regulations. (5-ACI-1E-03; 2-CO-1E-05)
- F. An inmate may appeal any decision related to their good time awards in accordance with Operating Procedure 866.1, *Offender Grievance Procedure*.

IX. Criteria and Restrictions for Special Status Inmates:

- A. An inmate's good time award eligibility status should not be affected upon the inmate's transfer back to a local jail facility.
- B. Restorative Housing Unit Assignment
  - 1. Inmates assigned to a Restorative Housing Unit are not eligible for advancement to Class Level I.
  - 2. If an inmate assigned to restorative housing (RHU) is Class Level I, the ICA should conduct a formal review within 90 days to determine if that Class Level is still appropriate.
  - 3. An inmate on RHU status should be ready to return to general population upon their advancement to Class Level II.
- C. Felony and Misdemeanor Conviction Class Level Restrictions
  - 1. Any inmate who commits a felony or misdemeanor (except escape convictions) while in confinement will automatically be reduced to Class Level IV effective the conviction date.
    - a. The inmate will not become eligible for an advancement in their Class Level for 12 months from the conviction date.
    - b. If the inmate is presently serving a sentence under the GCT system, the new consecutive sentence, or any new concurrent sentence extending the release date established under COV §53.1-159, *Mandatory release on parole* will be served under the GCA or ESC system after their GCT sentence has been satisfied.
  - 2. Any inmate convicted of a felony, misdemeanor, or a disciplinary offense for escape should automatically be reduced to Class Level IV effective the date of the conviction. The inmate will not be eligible for advancement in Class Level for 12 months from the date of their assignment to Class Level IV.
  - 3. Any inmate with an offense date of July 1, 1993 or later, and prior to January 1, 1995 for first degree murder, rape, forcible sodomy, animate or inanimate object sexual penetration, or aggravated sexual battery will not exceed the good conduct earning rate of GCA Class Level III on those sentences; see COV §53.1-199, *Eligibility for good conduct allowance; application*.
    - a. Any subsequent reduction in an inmate's Class Level requires formal ICA action and Facility Unit Head approval.
    - b. Staff will administratively assign the inmate to GCA Class Level III at the time of the inmate's initial sentence computation.
    - c. Staff may recognize these inmates for individual adjustment and performance that is representative of a higher GCA Class Level as follows.
      - i. The ICA will review the inmate and upon determining that the inmate's individual adjustment and performance are representative of Class I or Class II, staff may award the inmate with that level for recognition purposes only by designating the Class Level as Class Levels V-I or V-II, respectively.
        - (a) The GCA Class Level designations V-I and V-II will be the same earning level as Class III for sentence computation purposes.
        - (b) Class level V-I will be the same as Class Level I and Class Level V-II will be the same as Class Level II for recognition purposes.

- ii. Any subsequent in an inmate's recognition Class Level requires ICA action and Facility Unit Head approval.
- 4. Any inmate serving life imprisonment or two or more life sentences will not exceed the GCA earning rate of Class Level III; see COV §53.1-199, *Eligibility for good conduct allowance; application.*
  - a. Any subsequent reduction in an inmate's Class Level requires formal ICA action and Facility Unit Head approval.
  - b. Staff may recognize these inmates for individual adjustment and performance that is representative of a higher GCA class as follows:
    - i. The ICA may review the inmate and upon determining that an inmate's individual adjustment and performance are representative of Class Level I or Class Level II, staff may award the inmate that level for recognition purposes only by designating the level as Class Levels L-I or L-II, respectively.
      - (a) The GCA Class Level designations L-I and L-II will be the same earning level as Class III for sentence computation purposes.
      - (b) Class Level L-I will be the same as Class Level I and Class Level L-II will be the same as Class Level II for recognition purposes.
    - ii. Any subsequent reduction in an inmate's recognition or earning level requires ICA action and Facility Unit Head approval
- 5. Any inmate serving life imprisonment cannot earn ESC but staff may recognize the inmate for individual adjustment and performance that is representative of an ESC level.
  - a. Staff may award the inmate that level for recognition purposes only by designating the Class Level as Class Levels L-I, L-II, L-III or L-IV.
  - b. Any subsequent reduction in an inmate's recognition level requires ICA action and Facility Unit Head approval.

## X. Sentence Reduction

### A. Eligibility

1. Sentence reductions may not be applied to any sentence imposed for a felony offense committed on or after January 1, 1995; see COV §53.1-191, *Credits allowed in cases of injuries to or extraordinary services performed by prisoners; nonforfeiture of credits hereunder.*
2. Staff may recognize an inmate under the ESC system in another manner, but staff cannot recommend a sentence reduction.

### B. Institutional Level Recommendations

1. Every staff member can recommend any inmate that they deemed deserving, who the staff member observed performing any act defined as an extraordinary service or injurious based on one or more of the following criteria:
  - a. An inmate must have rendered effective and measurable assistance directly related to preventing an escape or in the apprehension of an escaped inmate.
  - b. Gives a blood donation to another inmate. In unusual circumstances, an inmate may receive credit for donating blood, under regulations prescribed by the Director, to blood banks licensed by or subject to regulations of the State Board of Health.
  - c. An inmate must have voluntarily, or at the instance of a corrections official, rendered other extraordinary services such as saving the life of any person, preventing serious bodily harm or substantial damage to state property.
  - d. An inmate must have suffered serious or debilitating bodily injury that was not the result of misconduct by the inmate and which was incurred by saving life or state property or in the performance of assigned job duties while in the corrections system.
2. When staff observe an inmate performing an extraordinary service or injurious act, the staff member



- observing the act should submit a written *Internal Incident Report* in VACORIS; see Operating Procedure 038.1, *Reporting Serious or Unusual Incidents*.
3. The *Internal Incident Report* must include:
    - a. The inmate's name and number
    - b. The location, by facility and area where the incident occurred
    - c. The date and time of day
    - d. A factual summary of what was observed
    - e. The name of the Reporting Officer and any others who may have witnessed the incident
  4. Staff should submit the initial *Internal Incident Report* in VACORIS within one working day for review by their immediate supervisor who, if deemed appropriate, should submit an *Internal Incident Report* providing additional pertinent details.
  5. Staff should normally submit the *Internal Incident Reports* for review by the Facility Unit Head within three working days of the incident.
  6. Facility Unit Heads must review each sentence reduction recommendation submitted by staff for completeness and will approve or disapprove the *Internal Incident Reports* in VACORIS.
    - a. The Facility Unit Head will investigate the *Internal Incident Reports*, to verify all facts reported and will prepare a summary report to include:
      - i. Signed statements from witnesses
      - ii. Copies of all reports and supporting documentation received to include the following when appropriate:
        - (a) *Internal Incident Report*
        - (b) *Incident Report*
        - (c) Special Investigations Unit report
        - (d) Corrective action follow-up
        - (e) Medical report indicating extent of injury
        - (f) Other supporting documentation
      - iii. A Facility Unit Head statement regarding the impact of the inmate's action upon the operation of the institution as a whole.
    - b. A Special Investigations Unit investigation will be conducted when one or more of the following occur:
      - i. An extraordinary service or injurious act was not directly observed by a staff member
      - ii. An extraordinary service or injurious act results in criminal charges being brought against an individual
      - iii. Any act which indicates a serious breach of institution security
      - iv. Disclosure of a discovered weapon
  7. The Facility Unit Head may refer the *Internal Incident Reports* back to staff for additional information, disapproval, or to recommend another avenue of commendation.
  8. If the Facility Unit Head determines that the inmate's action does not warrant a recommendation for sentence reduction, the Facility Unit Head will normally notify the inmate in writing of their decision within seven working days of receipt of the initial *Internal Incident Reports*.
  9. If the Facility Unit Head determines the inmate's action warrants a recommendation for sentence reduction, the Facility Unit Head will forward the *Internal Incident Report* and the summary report package to the office of the Regional Administrator for further action within three working days after completing the summary report.
  10. Staff should process recommendations, supporting documentation, incident reports and summary reports in a manner that ensures appropriate confidentiality. There is no requirement for an institutional committee or reviewer other than the Facility Unit Head to review sentence reduction recommendations.

11. Staff at the institutional level will not recommend the specific amount of credit to be given to an inmate under this operating procedure. The Sentence Reduction Committee will make the initial recommendation on the specific amount of credit to be given.

#### C. Chief of Corrections Operations Level

1. The Regional Administrator or Regional Operations Chief will review all sentence reductions recommendations and associated documents regarding inmate extraordinary service or injuries acts received from institutions for content and approval.
  - a. If approved, the Regional Operations Chief will forward the recommendation with a cover letter indicating their approval to the Chief of Corrections Operations.
  - b. If disapproved, the Regional Operations Chief will return the recommendation back to the sending institution for additional information, disapproval, rewrite or to recommend another avenue of commendation as an alternative to sentence reduction.
2. The Chief of Corrections Operations or designee may accept or reject the recommendation.
  - a. If accepted, the Chief of Corrections Operations will forward the recommendation and supporting documents to the Sentence Reduction Review committee.
  - b. If disapproved, the Chief of Corrections Operations will return the recommendation and supporting documents to the Regional Operations Chief.
3. Sentence Reduction Committee
  - a. The Chief of Corrections Operations will appoint a Sentence Reduction Review Committee composed of representatives from institutions, Regional Offices, and the Offender Management Services Unit.
  - b. The Committee will of a minimum of three members who will be rotated periodically. The senior member of the Committee will serve as the Chairperson.
  - c. Additionally, the Director of Offender Management Services may designate a Sentence Reduction Review Coordinator to handle administrative work for the Committee.
  - d. The Committee may conduct an investigation into the supporting documentation, incident reports and summary reports submitted by Facility Unit Heads.
    - i. Staff will include all pertinent identification and classification information in the documents presented to the Committee for review.
    - ii. The Sentence Reduction Committee must provide the identification and classification information documents with their recommendation to the Chief of Corrections Operations.
  - e. The Committee must consider each case independently and must submit their findings with appropriate recommendations for sentence credit to the Chief of Corrections Operations.
4. Upon receipt of the Sentence Reduction Committee's reports, the Chief of Corrections Operations will review the recommendation for approval or disapproval. If approved, the Chief of Corrections Operations or designee will forward the report to the Director for action.

#### D. Executive Level

1. In accordance with COV §53.1-191, *Credits allowed in cases of injuries to or extraordinary services performed by prisoners; nonforfeiture of credits hereunder* a sentence reduction may considered and granted to inmates in cases of extraordinary services performed or injuries to the inmate.
2. A review of the facts will be conducted in each case, and where appropriate, recommendations made to the Governor for final approval.
3. Upon the Governor's approval, the Chief of Corrections Operations will inform the Regional Operations Chief, Regional Administrator, Facility Unit Head, and inmate in writing of the sentence credit authorized in this case.
4. Staff should enter each sentence credit s into the inmate's VACORIS record within ten working days of receipt from the Governor.

E. Sentence credits awarded under COV §53.1-191, *Credits allowed in cases of injuries to or extraordinary services performed by prisoners; nonforfeiture of credits hereunder may not be forfeited for violation of written institutional rules and regulations.*

F. Inmate Appeals

An inmate may appeal any recommendations or decisions by submitting a *Regular Grievance 866\_F1* at their assigned institution; see Operating Procedure 866.1, *Offender Grievance Procedure*.

## REFERENCES

COV §19.2-310.2, *Blood, saliva, or tissue sample required for DNA analysis upon conviction of certain crimes; fee*

COV §53.1-153, *Eligibility of persons sentenced to jails for more than twelve months*

COV §53.1-159, *Mandatory release on parole*

COV §53.1-191, *Credits allowed in cases of injuries to or extraordinary services performed by prisoners; nonforfeiture of credits hereunder*

COV §53.1-196, *Good conduct credits of persons convicted after October 1, 1942; effect of credit upon eligibility for parole*

COV §53.1-197, *Credit allowed for career and technical educational or other educational training*

COV §53.1-198, *Certain persons to choose good conduct system*

COV §53.1-199, *Eligibility for good conduct allowance; application*

COV §53.1-202.1, *Limitation upon applicability of this article*

COV §53.1-202.3; A:1-17 and B, *Rate at which sentence credits may be earned; prerequisites*

Operating Procedure 038.1, *Reporting Serious or Unusual Incidents*

Operating Procedure 601.4, *Educational Testing*

Operating Procedure 730.3, *Mental Health Services: Levels of Service*

Operating Procedure 735.1, *Sex Offender and Crimes against Minors Registration*

Operating Procedure 735.2, *Sex Offender Treatment Services (Institutions)*

Operating Procedure 740.1, *Infectious Disease Control*

Operating Procedure 820.2, *Inmate Re-entry Planning*

Operating Procedure 830.1, *Institution Classification Management*

Operating Procedure 841.1, *Inmate Programs*

Operating Procedure 841.5, *Inmate and Probationer/Parolee Substance Use Testing and Treatment Services*

Operating Procedure 861.1, *Offender Discipline, Institutions*

Operating Procedure 866.1, *Offender Grievance Procedure*

Operating Procedure 920.1, *Community Case Opening, Supervision, and Transfer*

## ATTACHMENTS

Attachment 1, *Class Level Evaluation - Sample*

## FORM CITATIONS

*Good Conduct Allowance Opt-In 830\_F3*

*Regular Grievance 866\_F1*

# **EXHIBIT 3**



# COMMONWEALTH of VIRGINIA

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December 21, 2021

Harold W. Clarke, Director  
Virginia Department of Corrections  
Post Office Box 26963  
Richmond, Virginia 23261

Dear Director Clarke:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

## Issues Presented

You ask several questions regarding a provision of House Bill 5148, passed during the 2020 Special Session of the General Assembly, that amends § 53.1-202.3 of the Code of Virginia, effective July 1, 2022. The amendments provide for a new earned sentence credit rate schedule, but limit certain offenses to a maximum of 4.5 earned sentence credits for each 30 days served. Specifically, you ask the following:

1. When considering the language “any felony violation” does this include the completed act, as well as the other offense modifiers: Conspiracy, Attempts, Solicit, Solicit Juvenile to Commit, Accessory Before the Fact and Principal 2nd Degree?
2. If the above modifiers are also excluded from earning the enhanced earned sentence credits, is there language in the legislation excluding the modifiers for Aggravated Murder since § 53.1-202.3 does not specifically list § 18.2-31?
3. Does § 53.1-202.3(A)(10), by legal definition, include § 18.2-67.5 (Felony Attempted Rape, Forcible Sodomy, Object Sexual Penetration, Aggravated Sexual Battery)?
4. In § 53.1-202.3(17), a second or subsequent violation of § 18.2-51 or § 18.2-51.1 while such person was at liberty, would be excluded from the enhanced earned sentence credits. However, would such exclusion apply if the first violation of § 18.2-51 or § 18.2-51.1 was a malicious felonious assault? In the same way, in § 53.1-202.3(17)(g) would § 18.2-92 be excluded if the offender was previously convicted of violating § 18.2-90?



### Applicable Law and Discussion

House Bill 5148 amends § 53.1-202.3, which prescribes the rate at which an inmate may earn sentence credits. As relevant to your inquiries, the amended version of § 53.1-202.3(A) provides for “[a] maximum of 4.5 sentence credits may be earned for each 30 days served on a sentence for a conviction for any offense” enumerated in the statute.<sup>[1]</sup>

#### 1. “Felony” Language and Offense Modifiers

You first ask whether the phrase “any felony violation,” as it appears in several subsections of the revised statute, includes the substantive completed offense, as well as the following offense modifiers: conspiracy, attempt, solicit, solicit juvenile to commit, accessory before the fact, and principal in the second degree.

Statutory interpretation “begin[s] with the assumption ‘that the legislature chose, with care, the words it used when it enacted the relevant statute’” and courts consider their primary objective to be ascertaining and giving effect to the legislature’s intent, as expressed by the statute’s language.<sup>2</sup> If the statute’s language is unambiguous, courts consider themselves “bound by the plain meaning of that language.”<sup>3</sup> “[U]nless a literal interpretation . . . would result in manifest absurdity,” courts give effect to the intent of legislatures, as expressed by the chosen language.<sup>4</sup> The Supreme Court of Virginia uses the phrase “absurd result” “to describe situations in which the law would be internally inconsistent or otherwise incapable of operation.”<sup>5</sup> When a statute is subject to multiple interpretations, courts “apply the interpretation that will carry out the legislative intent behind the statute.”<sup>6</sup> Therefore, it is my opinion that the phrase “any felony violation” includes the substantive completed offense.

This analysis also guides my opinion as to offenses committed in the roles of principal in the second degree and accessory before the fact. By statute, “[i]n the case of every felony, 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,” except in limited circumstances.<sup>7</sup> Therefore, it is my opinion that the phrase “any felony violation” includes acting as a principal in the second degree or an accessory before the fact to one who violates any of the enumerated offenses in § 53.1-202.3(A).

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<sup>1</sup> VA. CODE ANN. § 53.1-202.3(A) (effective July 1, 2022). This and other citations to the Code of Virginia herein are from the electronic version of the Code on LexisNexis and are current through the 2021 Regular Session and Special Session I and II of the General Assembly.

<sup>2</sup> *Chapman v. Virginia*, 68 Va. App. 131, 136 (2017).

<sup>3</sup> *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007). The context in which a word or phrase is used also guides courts in determining a statute’s plain meaning. *Chapman*, 68 Va. App. at 136.

<sup>4</sup> *Conyers*, 273 Va. at 104; *see also* *Jacobs v. Wilcoxson*, 71 Va. App. 521, 526 (2020) (“[W]hile we look at the words of the statute to determine legislative intent, we will not interpret a statute in a way that leads to unreasonable or absurd results.”).

<sup>5</sup> *Boynton v. Kilgore*, 271 Va. 220, 227 n.9 (2006) (citation omitted).

<sup>6</sup> *Conyers*, 273 Va. at 104.

<sup>7</sup> VA. CODE ANN. § 18.2-18 (emphasis added). This section exempts §§ 18.2-31(A)(2), (A)(10), and (A)(13) from this general rule, and principals in the second degree and accessories before the fact to these aggravated murder provisions are treated as though the offense is first degree murder, which is, itself, a Class 2 felony. *See* VA. CODE ANN. § 18.2-32 (2021).

With respect to solicitation to commit any of the crimes listed in § 53.1-202.3(A), the legislature explicitly included solicitation to commit murder among the disqualifying offenses in § 53.1-202.3(A)(2). Solicitation is not referenced in any of the other subparagraphs. When the General Assembly includes specific language in one Code provision but omits that language from another, we must presume that the exclusion of the language was intentional.<sup>8</sup> Furthermore, interpreting § 53.1-202.3(A) to implicitly include solicitation to commit any of the listed crimes would render superfluous the explicit reference in § 53.1-202.3(A)(2) to solicitation to commit murder. It is a settled principle of statutory construction that no part of a statute “will be considered meaningless unless absolutely necessary.”<sup>9</sup> It is my opinion that an offense for solicitation to commit murder is not eligible for sentence credits, however, other solicitations may be eligible if the solicitation is of an enumerated offense in § 53.1-202.3(A).

Regarding attempts to commit the disqualifying crimes listed in § 53.1-202.3(A), subparagraph 10 includes any “[c]riminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2.”<sup>10</sup> Section 18.2-67.5 defines the disqualifying crimes, which include attempted rape, attempted forcible sodomy, attempted object sexual penetration, and attempted aggravated sexual battery. The General Assembly’s incorporation of some, but not all, attempts as disqualifying crimes signifies that the legislature’s exclusion of any language that would reference attempts to commit other crimes was intentional. Therefore, it is my opinion that the phrase “any felony violation” of the listed criminal statutes includes attempts to commit the felony sexual assaults prohibited by § 18.2-67.5 but does not include attempts to commit the other listed offenses.

## 2. Aggravated Murder and Offense Modifiers

Second, you ask if the modifiers addressed in the first question are excluded from the enhanced earned sentence credits, and, if so, whether the legislation includes language excluding the modifiers for aggravated murder, since § 53.1-202.3 does not specifically list § 18.2-31.

Section 18.2-31(A) lists the offenses constituting aggravated murder, which is punished as a Class 1 felony.<sup>11</sup> The amended version of § 53.1-202.3 provides for a maximum of 4.5 days of earned sentence credits, per 30 days served, for a Class 1 felony.<sup>12</sup> Thus, the completed act of aggravated murder is excluded from the enhanced earned sentence credits under § 53.1-202.3(A)(1).<sup>13</sup> Solicitation to commit aggravated murder is likewise excluded from the enhanced earned sentence credits.<sup>14</sup>

As discussed earlier, felony principals in the second degree and accessories before the fact are generally punished as if they are principals in the first degree.<sup>15</sup> However, these modifiers are excluded from the enhanced earned sentence credits because aggravated murder is excluded.<sup>16</sup> Accessories before the fact or principals in the second degree to those aggravated murder provisions “shall be indicted, tried,

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<sup>8</sup> *Brown v. Commonwealth*, 284 Va. 538, 545 (2012).

<sup>9</sup> *Id.* at 544.

<sup>10</sup> VA. CODE ANN. § 53.1-202.3(A)(10) (effective July 1, 2022).

<sup>11</sup> *Id.* § 18.2-31(A).

<sup>12</sup> *Id.* § 53.1-202.3(A)(1) (effective July 1, 2022).

<sup>13</sup> *Id.*

<sup>14</sup> VA. CODE ANN. § 53.1-202.3(A)(2) (effective July 1, 2022).

<sup>15</sup> *Id.* § 18.2-18.

<sup>16</sup> *Id.*; *see* VA. CODE ANN. § 53.1-202.3(A)(1) (effective July 1, 2022) (excluding Class 1 felonies).

convicted and punished as though the offense were murder in the first degree.”<sup>17</sup> First degree murder is excluded from the enhanced sentence credits.<sup>18</sup> Therefore, even the aggravated murder provisions excluded from the general rule for principals in the second degree and accessories before the fact, are omitted from the new enhanced sentence credits, by way of the exclusion for first degree murder offenses.

This leaves the conspiracy and attempt modifiers for resolution.<sup>19</sup> There is no direct reference to conspiracy to commit aggravated murder or attempted aggravated murder in § 53.1-202.3(A)(1) or -(A)(2),<sup>20</sup> and these aggravated murder modifiers do not fit within any offenses listed in those subsections. Therefore, an offender convicted of conspiracy to commit aggravated murder or attempted aggravated murder would be permitted to receive enhanced earned sentence credits.

### 3. Felony Attempted Rape, Forcible Sodomy, Object Sexual Penetration, and Aggravated Sexual Battery

Third, you ask whether § 53.1-202.3(A)(10) includes § 18.2-67.5 which governs felony attempted rape, forcible sodomy, object sexual penetration, and aggravated sexual battery. Under § 18.2-67.5, each of these offenses are felonies.<sup>21</sup> Section 53.1-202.3(A)(10) excludes “[c]riminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2.”<sup>22</sup> Therefore, convictions for the offenses outlined in § 18.2-67.5 are excluded from the enhanced earned sentence credits.<sup>23</sup>

### 4. Section 53.1-202.3(A)(17)

Your final question is whether the exclusion from earning certain credits in § 53.1-202.3(A)(17)(e) applies if an offender’s first violation of § 18.2-51 or § 18.2-51.1 was a malicious felonious assault. Similarly, you ask whether a violation of § 18.2-92 would fall under the exclusion from credits in § 53.1-202.3(A)(17)(g) if the offender was previously convicted of violating § 18.2-90.

Section 53.1-202.3(A)(17) allows offenders to earn a maximum of 4.5 sentence credits for each 30 days served on a sentence for a second or subsequent offense violation, but only applies to the offenses listed in that subdivision.<sup>24</sup> Thus, the exclusion in § 53.1-202.3(A)(17)(e) would not apply when an offender’s first violation of § 18.2-51 or § 18.2-51.1 was committed maliciously, as malicious violations are not included in § 53.1-202.3(A)(17)(e).<sup>25</sup> Likewise, § 53.1-202.3(A)(17)(g) would not apply where an offender violated § 18.2-92, but only previously violated § 18.2-90, since § 18.2-90 is not an offense listed in § 53.1-202.3(A)(17)(g).<sup>26</sup> Therefore, in the two scenarios that you ask about, the offender would be eligible for the enhanced earned sentence credits.

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<sup>17</sup> *Id.*

<sup>18</sup> VA. CODE ANN. §§ 18.2-32, 53.1-202.3(A)(2) (excluding “any violation of § 18.2-32”).

<sup>19</sup> For reference, conspiracy to commit a Class 1 felony constitutes a Class 3 felony and attempt to commit a Class 1 felony is a Class 2 felony. VA. CODE ANN. §§ 18.2-22(a)(1), -25.

<sup>20</sup> VA. CODE ANN. § 53.1-202.3(A)(1)-(2).

<sup>21</sup> *Id.* § 18.2-67.5(A)-(B).

<sup>22</sup> *Id.* § 53.1-202.3(A)(10) (effective July 1, 2022).

<sup>23</sup> *Id.* Subsection (A)(10) does not, however, cover attempted sexual battery, as it is a misdemeanor.

<sup>24</sup> *Id.* § 53.1-202.3(A)(17) (effective July 1, 2022) (“A second or subsequent violation *of the following offenses . . .*”) (emphasis added).

<sup>25</sup> *Id.* § 53.1-202.3(A)(17)(e) (effective July 1, 2022).

<sup>26</sup> *Id.* § 53.1-202.3(A)(17)(g) (effective July 1, 2022).

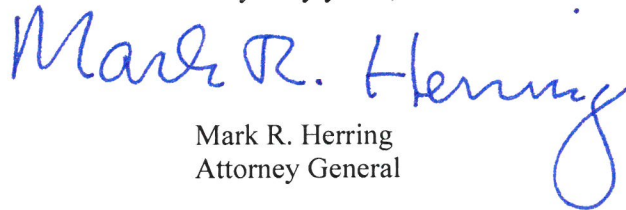
### Conclusion

For the foregoing reasons, it is my opinion that the language “any felony violation,” in the context of § 53.1-202.3(A), as amended, includes the completed act prohibited by the enumerated criminal statutes. It also includes acting as a principal in the second degree or accessory before the fact to the primary perpetrator of any listed offense. However, the statute only includes solicitation to commit murder and does not implicitly include solicitation to commit other listed crimes. The statute also includes attempts to commit certain felony sexual assaults listed in § 18.2-67.5, but does not implicitly include attempts to commit the other listed crimes.

The offense of aggravated murder and the aggravated murder modifiers of solicitation, principal in the second degree, and accessory before the fact, are excluded from the enhanced earned sentence credits, but conspiracy to commit and attempted aggravated murder are eligible for the enhanced earned sentence credits. As amended, § 53.1-202.3(A)(10) includes felony violations of § 18.2-67.5. Finally, as amended, the exclusion in § 53.1-202.3(A)(17)(e) does not apply to a second or subsequent violation of §§ 18.2-51 or 18.2-51.1 when the first violation was committed maliciously; and § 53.1-202.3(A)(17)(g) would not apply when an offender violates § 18.2-92, but only previously violated § 18.2-90.

With kindest regards, I am,

Very truly yours,

A handwritten signature in blue ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looped final letter 'g'.

Mark R. Herring  
Attorney General

# **EXHIBIT 4**



# COMMONWEALTH of VIRGINIA

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April 13, 2022

Harold W. Clarke, Director  
Virginia Department of Corrections  
Post Office Box 26963  
Richmond, Virginia 23261

Dear Director Clarke:

I am responding to your request for an official opinion in accordance with § 2.2-505 of the Code of Virginia.

## Issues Presented

You have asked that I reconsider an opinion of this office issued to you on December 21, 2021.<sup>1</sup> That opinion dealt with four questions regarding House Bill 5148,<sup>2</sup> which was passed by the General Assembly in its 2020 Special Session to provide for a new earned sentence credit rate schedule, effective July 1, 2022. This new earned sentence credit rate schedule provides for enhanced earned sentence credits for offenses that are not excluded under the language of the bill. Your questions relate to the offenses that are excluded from the new earned sentence credit rate schedule.

Specifically, you have asked:

1. "When considering the language 'any felony violation,' does this include the completed act, as well as the other offense modifiers: Conspiracy, Attempts, Solicit, Solicit Juvenile to Commit, Accessory Before the Fact and Principal 2nd Degree?"
2. "If the above modifiers are also excluded from earning the enhanced earned sentence credits, is there language in the legislation excluding the modifiers for Aggravated Murder since § 53.1-202.3 does not specifically list § 18.2-31?"
3. "Does § 53.1-202.3(A)(10), by legal definition, include § 18.2-67.5 (Felony Attempted Rape, Forcible Sodomy, Object Sexual Penetration, Aggravated Sexual Battery)?"

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<sup>1</sup> 2021 Op. Va. Att'y Gen. No. 21-068, available at <https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/1917-2021-official-opinions#december>.

<sup>2</sup> I note that as a member of the General Assembly, I voted against this legislation.

4. "In § 53.1-202.3(A)(17), a second or subsequent violation of § 18.2-51 or § 18.2-51.1 while such person was at liberty, would be excluded from the enhanced earned sentence credits. However, would such exclusion apply if the first violation of § 18.2-51 or § 18.2-51.1 was a malicious felonious assault? In the same way, in § 53.1-202.3(A)(17)(g) would § 18.2-92 be excluded if the offender was previously convicted of violating § 18.2-90?"

I have reconsidered the prior opinion and now provide the following analysis, which in part amends the earlier opinion and addresses certain issues that were omitted.

#### **Applicable Law**

The bill in question, House Bill 5148, establishes a new earned sentence credit rate schedule but sets out certain offenses that will be excluded from the new schedule and therefore ineligible for enhanced earned sentence credits. Under the language of the bill, the excluded offenses will be limited to "[a] maximum of 4.5 sentence credits . . . for each 30 days served." The provisions of the bill pertaining to the excluded offenses will be codified in Virginia Code § 53.1-202.3(A). Effective July 1, 2022, the subsection will read as follows, in relevant part:

A maximum of 4.5 sentence credits may be earned for each 30 days served on a sentence for a conviction for any offense of:

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;  
[ . . . ]
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;  
[ . . . ]
10. Criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;  
[ . . . ]
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;

[. . .]

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;

[. . .]

g. Any violation of § 18.2-89 or 18.2-92[.]

For the sake of simplicity, I will refer to this subsection as “§ 53.1-202.3(A),” as if it were currently codified.

### Discussion/Analysis

#### Question One

As I understand your first question, you ask: (1) whether the language “any felony violation” in § 53.1-202.3(A) includes convictions for conspiracy, attempt, or solicitation to commit the listed crimes; and (2) whether the language “any felony violation” in § 53.1-202.3(A) includes convictions for acting as an accessory before the fact or a principal in the second degree in the commission of the listed crimes.

Section 53.1-202.3(A) does not explicitly state whether convictions for conspiracy, attempt, or solicitation are included in the term “any felony violation.” Nevertheless, the language of the subsection indicates that the term “any felony violation” is intended to include such convictions. Subdivision (A)(2) lists “[s]olicitation 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” as included within its scope. To read the term “any violation of” in this subdivision as referring to only the completed crime would lead to the irrational conclusion that the General Assembly intended to make solicitation to commit murder ineligible for enhanced sentence credits—yet leave convictions for conspiracies or *actual attempts* to commit murder eligible for enhanced sentence credits. Courts will give a statute a “reasonable . . . interpretation consistent with its apparent purpose and [legislative intent],”<sup>3</sup> and will avoid an interpretation that leads to irrational results.<sup>4</sup> Accordingly, I conclude that convictions for conspiracy, attempt, or solicitation are included in the language “any felony violation” in § 53.1-202.3(A).<sup>5</sup>

Convictions for acting as an accessory before the fact or as a principal in the second degree are also included in the language “any felony violation.” Section 18.2-18 of the Code provides generally that “[i]n the case of every felony, 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.”<sup>6</sup> Therefore, such accomplices bear the same liability as their principal. It follows that convictions for acting as an accessory before the fact or as a principal in the second degree to crimes listed after the terms “any felony violation”

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<sup>3</sup> *Bustillos v. Murphy*, 96 Cal. App. 4th 1277, 1280 (4th Dist. 2002).

<sup>4</sup> *VEPCO v. Citizens for Safe Power*, 222 Va. 866, 869 (1981) (“[W]e presume that the General Assembly does not intend the application of a statute to lead to irrational consequences.”).

<sup>5</sup> I note that this analysis is based on current law, which makes any conviction for conspiracy, attempt, or solicitation to commit one of the relevant offenses a felony (see Virginia Code § 18.2-22(a), § 18.2-26, and § 18.2-29), and is not intended to address any potential future scenarios in which a conviction for conspiracy, attempt, or solicitation to commit one of the relevant offenses is not classified as a felony.

<sup>6</sup> VA. CODE ANN. § 18.2-18 (2021).



in § 53.1-202.3(A) fall within the scope of that subsection and are therefore excluded from eligibility for enhanced sentence credits.

#### Question Two

I understand your second question to be whether § 53.1-202.3(A) applies to convictions for aggravated murder—and if so, whether it also applies to convictions for conspiracy, attempt, or solicitation to commit aggravated murder; or to convictions for commission of aggravated murder as an accessory before the fact or a principal in the second degree.

Aggravated murder is classified as a Class 1 Felony.<sup>7</sup> Because § 53.1-202.3(A) includes any “Class 1 Felony,” aggravated murder is included in the scope of the subsection, even though it is not explicitly named as such.

As mentioned above, § 53.1-202.3(A) explicitly provides that “solicitation to commit murder” is included in the scope of the subsection. “Solicitation to commit murder” by definition includes “solicitation to commit aggravated murder.” Therefore, solicitation to commit aggravated murder is included in the scope of § 53.1-202.3(A). Further, consistent with the analysis set forth in “Question One” above with respect to § 53.1-202.3(A)(2), any conviction for attempt or conspiracy to commit aggravated murder is likewise included in the scope of the subsection, making these offenses ineligible for enhanced earned sentence credits.

As discussed earlier, § 18.2-18 of the Code provides generally that in the case of every felony, an individual who is convicted of acting as an accessory before the fact or a principal in the second degree bears the same liability as their principal. Thus, an individual who is convicted of such accomplice liability in an aggravated murder is generally convicted of aggravated murder itself. While § 18.2-18 sets out certain exceptions whereby such an accomplice shall be convicted of first degree murder rather than aggravated murder, first degree murder is also included in the scope of § 53.1-202.3(A). Therefore, any conviction for acting as an accessory before the fact or a principal in the second degree to an aggravated murder falls within the scope of § 53.1-202.3(A).

#### Question Three

You next ask whether § 53.1-202.3(A)(10) includes, by legal definition, § 18.2-67.5, which establishes criminal penalties for attempted rape, forcible sodomy, object sexual penetration, or aggravated sexual battery. Section 53.1-202.3(A)(10) includes convictions for “[c]riminal sexual assault punishable as a felony under Article 7 . . . of Chapter 4 of Title 18.2,” which includes § 18.2-67.5. In my opinion, based on the reasoning set forth in “Question One” above, and consistent with apparent legislative intent, § 53.1-202.3(A)(10) includes all felony convictions of § 18.2-67.5, making them ineligible for enhanced earned sentence credits.

#### Question Four

Your final question is whether § 53.1-202.3(A)(17)(e) would apply to a second offense conviction of § 18.2-51 or § 18.2-51.1, where the first offense was committed maliciously.<sup>8</sup> Relatedly, you ask whether a conviction for a violation of § 18.2-92 would fall within the scope of § 53.1-202.3(A)(17)(g) if the offender was previously convicted of violating § 18.2-90.

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<sup>7</sup> VA. CODE ANN. § 18.2-31 (2021).

<sup>8</sup> I assume, under this hypothetical, that no convictions of § 18.2-54.1 or § 18.2-54.2 exist.

Based on the plain language of the provision, a conviction for a second offense of § 18.2-51 or § 18.2-51.1 would not fall under the scope of § 53.1-202.3(A)(17)(e) where the first offense was committed maliciously. Likewise, a conviction for violating § 18.2-92, where the offender was only previously convicted of violating § 18.2-90, would not fall within the scope of § 53.1-202.3(A)(17)(g).

### Conclusion

For the foregoing reasons, it is my opinion that:

1. Convictions for conspiracy, attempt, or solicitation are included in the language “any felony violation” in § 53.1-202.3(A), making such convictions of the listed crimes ineligible for enhanced earned sentence credits. Convictions for acting as an accessory before the fact or as a principal in the second degree to these same crimes also fall within the scope of that subsection and are excluded from eligibility for enhanced earned sentence credits.
2. Section 53.1-202.3(A) includes convictions for aggravated murder, and also convictions for solicitation, conspiracy, or attempt to commit aggravated murder. Further, any conviction for acting as an accessory before the fact or a principal in the second degree to an aggravated murder falls within the scope of § 53.1-202.3(A), making such convictions ineligible for enhanced earned sentence credits;
3. Convictions for felony violations of § 18.2-67.5 are included in the scope of § 53.1-202.3(A)(10) and are therefore ineligible for enhanced earned sentence credits;
4. A conviction for a second offense of § 18.2-51 or § 18.2-51.1 would not fall under the scope of § 53.1-202.3(A)(17)(e) where the first offense was committed maliciously. Likewise, a conviction for violating § 18.2-92, where the offender was only previously convicted of violating § 18.2-90, would not fall within the scope of § 53.1-202.3(A)(17)(g). As such, those convictions would be eligible for enhanced earned sentence credits.<sup>9</sup>

To the extent the analysis in the prior opinion is inconsistent with this above analysis, the prior opinion is hereby superseded.

With kindest regards, I am,

Very truly yours,



Jason S. Miyares  
Attorney General

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<sup>9</sup> In my view, the conclusions with respect to Question 4 represent a poor policy outcome, and I would encourage further review by the General Assembly.