IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. _____

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.

PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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I. INTRODUCTION

This case presents the question of how Virginia's amendments to its earned sentence credit program apply to people convicted of inchoate offenses. Virginia's General Assembly passed House Bill 5148, 2020 Va. Acts. Spec. Sess. I, chs. 50, 52 ("H.B. 5148") in 2020, allowing people in Virginia Department of Corrections ("VDOC") custody to earn additional sentence credits toward their release. These additional credits are conditioned on good behavior and efforts toward rehabilitation, including participating in job training and other programs. Incarcerated people are eligible for credits under the law as a default, but the law does explicitly exclude certain enumerated offenses from eligibility for expanded credits.

In *Prease v. Clarke*, 888 S.E.2d 758 (Va. 2023), the Court considered whether people convicted of inchoate versions of the enumerated offenses were eligible for the expanded sentence credits, and it found that only offenses specifically enumerated in subsection A of Va. Code Ann. § 53.1-202.3 were excluded from eligibility for those credits. The legislature meant what it said, the Court reasoned, and enumerated offenses were excluded, but offenses that were not listed were eligible. This same reasoning clearly applies to inchoate offenses related to robbery, which are not explicitly enumerated in § 53.1-202.3(A).

Petitioner Leslie Puryear is currently serving two consecutive sentences for attempted robbery and for parole violations related to a prior drug possession charge.[1] As of September 2023, he has served twelve years of his eighteen-year sentence.

After Attorney General Mark Herring issued an opinion that people with inchoate offenses not specifically enumerated in § 53.1-202.3(A) were eligible for expanded credits, VDOC notified Mr. Puryear that he would be awarded expanded sentence credits and released shortly. After Mr. Puryear had completed his re-entry counseling, planned for his release, and notified his family, VDOC notified Mr. Puryear in that, pursuant to a subsequent opinion issued by Attorney General Jason Miyares, he would not be released. Based on this Court's ruling in *Prease* and the plain language of the statute, it is clear that Mr. Puryear is eligible for expanded sentence credits. The offenses for which he is serving his sentence are not enumerated among the offenses disqualified from eligibility. Despite the Court's decision in *Prease*, VDOC continues to incarcerate Mr. Puryear, and his projected release date is now April of 2025.

The Court rightly decided in *Prease* that the General Assembly, in drafting H.B. 5148, meant to exempt only the offenses it enumerated there. But because

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[1] The underlying offenses for the parole violations are not listed in § 53.1-202.3(A) and are therefore not at issue in this case.

VDOC has not applied *Prease* to inchoate offenses related to those completed offenses that are enumerated in H.B. 5148, this Court must now decide again whether non-enumerated inchoate offenses disqualify people from expanded sentence credit eligibility. Under the Court's reasoning in *Prease* and traditional canons of statutory construction, they do not, and Mr. Puryear is entitled to relief.

II. BACKGROUND

A. VIRGINIA'S EARNED SENTENCE CREDIT PROGRAM.

1. The Earned Sentence Credit Program Was Established in 1994 and Applies to All Incarcerated People.

In 1994, the Virginia General Assembly created the "earned sentence credit program," a revision of its "Good Conduct Time" policy intended to incentivize good behavior in prison. *See* Va. Code Ann. § 53.1-202.2 *et seq*. This scheme initially gave a maximum of 4.5 earned sentence credits ("ESCs") per 30 days served. Va. Code Ann. § 53.1-202.2(A). However, the actual number of credits varied across individuals, and VDOC was given broad discretion to grant or rescind credits. *See* Va. Code Ann. § 53.1-202.4 (effective until July 1, 2022) (granting VDOC power to "[e]stablish criteria" upon which credits were granted or rescinded). VDOC created a classification system whereby individuals who VDOC determined had exhibited good behavior were classified as Level 1 or 2 and given some credits (up to the maximum 4.5 credits per 30 days served), while those VDOC determined did not exhibit good behavior or who had disciplinary

infractions were classified as Level 3 or 4 and were either given fewer or no credits. *Id*.

2. The 2020 Revision to the Earned Sentence Program Created a Two-Tier System and Granted More ESCs to Eligible Incarcerated People.

In 2020, the General Assembly revised the earned sentence credit program, creating a two-tiered system where people were eligible for a greater number of ESCs unless they were convicted of certain enumerated offenses, in which case they were subject to the old scheme. *See* Va. Code Ann. § 53.1-202.3(A) (enumerating offenses exempted from expanded ESCs, subject to the old scheme). The revised statute enshrined the level system VDOC had created and provided that incarcerated people who achieved their re-entry plan goals would be classified as Level 1 or 2 and given 15 credits per 30 days served, the maximum number of sentencing credits. Those who did not, or who had disciplinary infractions, would be classified Levels 3 or 4, and given 4.5 credits per 30 days served. *Id*.[2] Those with enumerated offenses under subsection A are excluded from earning the expanded credits but may still receive 4.5 credits per 30 days under the old

[2] As part of the 2020 statutory change, the Assembly also removed some of VDOC's discretion in awarding credits, instead setting out specific criteria for eligibility for each level of the class system and awarding a specific number of credits to individuals based on their level. Va. Code. Ann § 53.1-202(B) (defining class levels, setting how many credits each level receives).

scheme. The legislature intentionally made this law apply retroactively and acknowledged that the law's enactment could result in the release of people who otherwise would have remained incarcerated. 2020 Va. Acts, Spec. Sess. I, Ch. 50.

B. H.B. 5148 HAS BEEN SUBJECT TO CONFLICTING ATTORNEY GENERAL OPINIONS.

1. Attorney General Herring's Opinion Concluded that Attempt Convictions are Not Excluded from the Expanded ESCs.

After the 2020 Amendments were passed, VDOC sought then-Attorney General Mark Herring's opinion as to whether certain offenses, including inchoate offenses, were subject to the expanded ESCs. VDOC explicitly asked Attorney General Herring whether certain offense modifiers like "conspiracy," "attempt," and "solicit" were included as part of the offenses.

On December 21, 2021, Attorney General Herring released his opinion. Va. Off. Att'y Gen. Op. No. 21-068 (Dec. 21, 2021), 2021 WL 6112902 at *1 ("Herring Opinion"). Relevant to this petition, Attorney General Herring concluded that convictions for attempt of one of the offenses enumerated in Va. Code Ann. § 53.1-202.3(A) do still qualify for the expanded ESCs except for those explicitly enumerated. Herring Opinion at *1-2. Applying the canons of statutory construction, Herring noted that the statute's explicit mention of certain inchoate offenses and omission of others must be read as intentional, and so the Assembly

must have intended to make those convicted of offenses not enumerated eligible to earn expanded ESCs. *Id*.

2. Attorney General Miyares Subsequently Issued a Conflicting Opinion.

VDOC, apparently unhappy with Herring's opinion, sought reconsideration in January 2022, days after the change in administration. The new Attorney General, Jason Miyares, issued an opinion in April 2022 coming to the opposite conclusion. Va. Off. Att'y Gen. Op. No. 22-008 (Apr. 13, 2022), 2022 WL 1178995 at *1 ("Miyares Opinion").

Arguing without authority that a contrary opinion would be "irrational," Miyares found that any conviction of an inchoate version of any of the enumerated offenses would render one ineligible for the expanded ESCs. *Id*. He noted that the legislature could not have intended certain enumerated offenses that are less severe to be punished more harshly than more severe non-enumerated offenses, but he gave no legislative history or other justification for this policy opinion. His opinion conflicts with the plain language of the statute, his predecessor's opinion, and later holdings by this Court.

C. VDOC USED THE MIYARES OPINION TO DENY MR. PURYEAR ESCs.

Mr. Puryear has maintained a Level 1 classification for over ten years, such that he should be eligible for retroactive sentence credits at a rate of 15 days for

every 30 served during that time. The application of the expanded credits would have resulted in Mr. Puryear's release by now.

VDOC at first proceeded under the interpretation advanced by Attorney General Herring, notifying Mr. Puryear that he was eligible for the expanded credits, such that his release was imminent. After Attorney General Miyares issued his conflicting opinion, VDOC changed its position. Mr. Puryear was notified months after he expected to be released that he would not be awarded expanded ESCs and that, as a result, his projected release date remained April 2025. Because Mr. Puryear had not lost any sentence credits as a result of any disciplinary charges, the Miyares Opinion interpreting Va. Code Ann. § 53.1-202.3 was the sole basis for the change in VDOC's position on his release. VDOC then failed to apply this Court's decision in *Prease* to Mr. Puryear's credits and continued to detain him. VDOC's calculation of credits based on an erroneous interpretation of the law has resulted in the extension of Mr. Puryear's detention well past when he should have been released.

III. ARGUMENT

This case involves the application of a principle this Court has already decided: where the legislature did not enumerate an offense for exclusion from expanded sentence credits in Va. Code Ann. § 53.1-202.3, may VDOC nevertheless withhold expanded sentence credits for that offense? As the Court

decided in *Prease v. Clarke*, 888 S.E.2d 758 (2023), it may not: § 53.1-202.3 means what it says, and where an offense is not listed among exclusions, a person serving a sentence for that offense is eligible for expanded credits. Based on both the holding of *Prease* and core canons of statutory interpretation, a person serving a sentence for an inchoate offense not enumerated in subsection A is eligible for the expanded ESCs.

A. *PREASE* ADDRESSED THIS ISSUE AND IS CONTROLLING HERE.

In *Prease*, this Court was asked to settle the dispute between the two attorney general opinions on Va. Code Ann. § 53.1-202.3. The Court began with a careful reading of the statute, stating at the outset that it reviews statutory language with a presumption "that the legislature chose, with care, the words it used when it enacted the relevant statute." *Id*. at 761 (*citing Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 291 Va. 269, 277, 784 S.E.2d 280 (2016)). Following this principle, the Court reasoned that, "[b]y its plain language, Code § 53.1-202.3 establishes that all inmates are eligible for expanded earned sentence credits unless they were convicted of an offense that is enumerated under subsection A." *Id*. at 762. The dispositive issue, then, was "whether attempted aggravated murder is one of the enumerated offenses that is ineligible for expanded earned sentence credits under subsection A." *Id*.

Mr. Prease's sentence was for the offense of attempted aggravated murder. That offense is not enumerated in the statute. The completed crime of aggravated murder itself is not enumerated in the statute but is encompassed among the offenses that are ineligible for expanded credits because it is a Class 1 felony, and Class 1 felonies as a group are enumerated. Va. Code Ann. § 53.1-202.3(A)(1). The state had argued that, although attempted aggravated murder was not among the listed exclusions, Mr. Prease was nevertheless excluded from the expanded credit scheme because it contended that attempted aggravated murder was included under the first-degree murder statute, or because the phrase "any violation of" the enumerated offenses should be read to include inchoate offenses. The Court disagreed, holding that attempted aggravated murder was not encompassed either in subsection (A)(1) or (A)(2), because it was a class 2 felony, and the aggravated murder statute was not specifically enumerated. The Court concluded that there was "no basis in the governing statutes for denying Prease expanded earned sentence credits on his attempted aggravated murder convictions." *Id*. The Court also rejected the Attorney General's public policy and absurdity arguments, finding that a reading of the statute's plain language would not trigger a result that was internally inconsistent or impossible to implement. *Id.* at 763.

This Court's decision in *Prease* is controlling here: inchoate offenses not enumerated in Code § 53.1-202.3(A) are eligible for the expanded ESCs. Mr.

Puryear is serving a sentence for attempted robbery, a class 4 felony. The statute does not contain an exclusion for either class 4 felonies generally or for attempted robbery specifically. Instead, the 2020 revision to the earned sentence program makes those convicted of the *completed offense of robbery* under §18.2-58 ineligible for expanded credits. Because the offense for which Mr. Puryear is serving a sentence is not among the enumerated exemptions, he is eligible for the expanded ESCs.

In its opinion, the Court declined to reach the issue of whether the phrase "any violation of" the enumerated code sections indicated that inchoate offenses were implicitly encompassed within the exclusions from eligibility for expanded credits, because it was not necessary to the Court's decision. The same is true here. Subsection 9 of § 53.1-202.3(A) does not use the phrase "any violation of" or "any felony violation of" in relation to the robbery statute. Thus, Mr. Puryear's case is on all fours with *Prease*, and under the reasoning there, the Court should hold that Mr. Puryear is eligible for expanded sentence credits and is therefore entitled to relief.

1. The Canons of Statutory Construction Applied in *Prease* Compel Awarding Credits Here.

a. Code Ann. § 53.1-202.3(A)'s Plain Language Does Not Exclude Petitioner's Inchoate Offenses from Eligibility for Expanded ESCs.

Courts are "bound by the plain meaning" of the statutory language, and "may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated." *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003); *see also Mozley v. Prestwould Bd. Of Dirs*., 264 Va. 549, 554, 570 S.E.2d 817, 820 (2002) ("[W]hen the General Assembly has used words of a plain and definite import, courts cannot assign to them a construction that would be tantamount to holding that the General Assembly intended something other than that which it actually expressed."). Courts, in interpreting statutory language, must "assume that the legislature chose, with care, the words it used," and refrain from adding language that the General Assembly declined to add. *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004); *Wakole v. Barber*, 283 Va. 488, 495, 722 S.E.2d 238, 242 (2012) ("Courts cannot add language to the statute the General Assembly has not seen fit to include.") (internal quotations omitted).

Beginning with the plain language of the statute at issue here, the list of offenses excluded by Va. Code. Ann § 53.1-202.3(A) does not explicitly include

attempted robbery. While robbery is included among the exemptions in subsection A, there is no language suggesting that attempted robbery is also excluded.

The maxim of *expressio unius est exclusio alterius* is one that has been well-established by this and other high courts. *See, e.g.*, *Turner v. Sheldon D. Wexler, D.P.M., P.C.*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992) ("mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute."); *Smith Mountain Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001) (holding that the statute governing ownership of "the beds of the bays, rivers, creeks and the shores of the sea" did not apply to "lakes," because it was not among the specifically enumerated bodies of water); *Miller v. Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 543-45, 790 S.E.2d 484, 487-88 (2016) (where statute provided that special district taxes were subject to specific code sections, *expressio unius* principle precluded those taxes from being subject to other unenumerated code sections); *Saunders v. Commonwealth*, 48 Va. App. 196, 203, 629 S.E.2d 701, 704 (2006) ("[w]here [the legislature] includes specific language in one sections but omits that language from another section, we presume that the exclusion of the language was intentional.").

In Va. Code Ann §53.1-202.3(A), the legislature lists all offenses that are excluded from the revised credits scheme, including citations to the Virginia Code.

The statute also notes that only the explicitly enumerated offenses are ineligible for the expanded ESCs. This list contains no mention of attempted robbery, nor does it contain any mentions of Chapter 3 of Title 18.2 of the Virginia Code, which governs inchoate offenses like attempt. The statute references over 50 sections of the Virginia Code using varied and specific language for each exemption. Inchoate offenses such as solicitation to commit murder under § 18.2-29 (§ 53.1-202.3(A)(2)); conspiring, aiding, and abetting acts of terrorism (§ 53.1-202.3(A)(4)); certain attempts under Article 4 of Chapter 4 of Title 18.2 (§53.1-202.3(A)(6)); and certain attempts included in Article 7 of Chapter 4 of Title 18.2, including attempted rape and attempted aggravated sexual battery under § 18.2-67.5 (§ 53.1-202.3(A)(10)) are all explicitly named in the statute as ineligible.

Further, the General Assembly has demonstrated in other code sections that it is well aware of how to specify that inchoate offenses should be included or excluded from the application of a statute, and typically does so when that is what it intends. For example, Va. Code Ann. § 9.1-902, which relates to registration for sex offenses and crimes against minors, specifically notes that the offenses that require registration "*include any violation of, attempted violation of, or conspiracy to violate*" various code sections. *See also* Va. Code Ann. § 19.2-299 (requiring courts to direct probation officers to take certain actions where defendants are "adjudged guilty of a felony violation of . . . *or attempt to commit a felony*

violation of" various code sections, including code sections containing only completed offenses) (emphasis added); Va. Code Ann. § 18.2-370.2 (defining offenses prohibiting proximity to children as "a violation *or an attempt to commit a violation of*" various code sections) (emphasis added); Va. Code Ann. § 19.2-316.4 (defining nonviolent felony as "any felony except those considered an act of violence pursuant to § 19.2-297.1 or *any attempt to commit any of those crimes*") (emphasis added). Thus, the legislature plainly knows how to indicate when it intends to include attempts or other inchoate offenses within the purview of a statute, and this Court's presumption that it would do so intentionally and explicitly is entirely warranted. *Saunders v. Commonwealth*, 48 Va. App. 196, 203, 629 S.E.2d 701, 704 (2006) ("[w]here [the legislature] includes specific language in one section but omits that language from another section, we presume that the exclusion of the language was intentional.").

The Legislature knew how to exempt certain inchoate offenses from the expanded ESCs, such that its failure to enumerate offenses—including attempted robbery—was intentional.

b. <u>The Inclusion of All Inchoate Offenses Would Make Portions of the Statute as Written Superfluous.</u>

Interpreting the language of the statute as VDOC and the Attorney General have suggested—disqualifying all inchoate offenses from the expanded ESC scheme—would make portions of § 53.1-202(A) superfluous. The Court's "task in

statutory interpretation is to give reasonable effect to every word in a statute, […] and we will not read a legislative enactment in a manner that renders any portion of that enactment useless." *Berry v. Bd. of Supervisors of Fairfax Cnty*., 884 S.E.2d 515, 530 (2023) (*citing Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61 (1984)) (internal quotations omitted). To read the statute in a manner that makes significant portions of it meaningless or duplicative is to go against the plain language of the statute and against the intent of the Legislature. *Id*., *see also Porter v. Commonwealth*, 276 Va. 203, 230, 661 S.E.2d 415, 427 (2008); *County of Albemarle v. Camirand*, 285 Va. 420, 425, 738 S.E.2d 904, 906-7 (2013).

VDOC and the Attorney General's reading of the statute as implicitly disqualifying all attempt, conspiracy, and solicitation convictions from earning expanded ESCs makes the explicit references in § 53.1-202(A) to inchoate offenses wholly superfluous. The Court has appropriately rejected such a reading.

c. <u>This Court Has Already Rejected Attorney General Miyares' Absurdity Arguments.</u>

Attorney General Miyares, in his opposition to Mr. Prease's habeas petition, devoted significant time to the theory that granting people like Mr. Puryear their expanded ESCs would create an "absurd" result. In statutory interpretation, an "absurd" reading of the statute is one that "results in the statute being internally inconsistent or otherwise incapable of operation." *City of Charlottesville v. Payne*, 299 Va. 515, 532, 856 S.E.2d 203 (2021); *see also Tvardek v. Powhatan Vill.*

Homeowner's Ass'n, Inc., 291 Va. 269, 280, 784 S.E.2d 280, 286 (2016) (the classic "absurd" reading of a statute would be to render it dysfunctional); *Cook v. Commonwealth*, 268 Va. 111, 116, 597 S.E.2d 84,87 (2004) (rejecting absurdity argument despite outcome of the statute being deemed "unwise.").

This Court rejected the absurdity argument in *Prease*, noting that the reading of the statute Petitioner advanced there was neither internally inconsistent nor incapable of operation. *Prease*, 888 S.E.2d at 762. The facts of this case bear out that conclusion—VDOC, in relying on the Herring Opinion, counseled Mr. Puryear on his rights and obligations, calculated his credits, informed him of his new release date, and assisted him with re-entry and pre-release counseling. The *Prease* Court's interpretation of Va. Code Ann. § 53.1-202.3(A) is internally consistent and readily capable of operation.

B. MR. PURYEAR IS ENTITLED TO HABEAS RELIEF.

Mr. Puryear is eligible for habeas relief from this Court. "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). Va. Code Ann. § 8.01-654(A)(1) offers habeas corpus relief to incarcerated people detained without lawful authority. *See, e.g.*, *Carroll v. Johnson*, 278 Va. 683, 693 S.E.2d 647 (2009). This means that

habeas relief is available where a ruling in the petitioner's favor will directly impact the petitioner's confinement, especially where such a ruling will result in release. *Id*. at 693, 652; *see also Prease*, 888 S.E.2d at 761, fn. 5.

VDOC has continued to detain Mr. Puryear pursuant to its erroneous interpretation of the statute. All convictions Mr. Puryear is serving his sentence for are eligible for the expanded ESCs and, with the ESCs applied, Mr. Puryear would have already been released from confinement. After being notified that he would be released pursuant to the expanded credit statute, Mr. Puryear began to prepare for his release, including undergoing re-entry training, pre-release counseling, and securing the help of family and friends. Months later, he was told that he was in fact ineligible for the expanded ESCs and would not be released. This was devastating for him and for his family, who was looking forward to welcoming him home. But for VDOC's application of the statute as interpreted by the Miyares Opinion, Mr. Puryear would have been released more than a year ago. For the reasons outlined in this Memorandum, Mr. Puryear should be awarded the expanded earned sentence credits as per the 2020 amendments to § 53.1-202.3(B). Those credits will result in his immediate release. Accordingly, habeas relief is appropriate in this case and should be granted.

IV. CONCLUSION

This case presents a straightforward issue, governed by precedent and by well-established canons of construction. Va. Code Ann. § 53.1-202.3(A) does not include unenumerated inchoate offenses and should not be read that way. Under *Prease*, Mr. Puryear is eligible for application of the expanded credit scheme and is entitled to relief, and this Court should order his immediate release.

RESPECTFULLY SUBMITTED,

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