No. 18-8973

IN THE

SUPREME COURT OF THE UNITED STATES

Joshua Mitch Johnson, #1162995, Petitioner,

vs.

Harold W. Clarke, Director
Virginia Department of Corrections, Respondent.

ON PETITION FOR REHEARING TO THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING

Joshua Mitch Johnson, #1162995

Pocahontas State Correctional Center

P.O. Box 518

Pocahontas, Virginia 24635

Pro Se Petitioner

JURISDICTION

Pursuant to Supreme Court Rule 44, this Honorable Court has jurisdiction in this case and the Petitioner has timely filed his Petition for Rehearing.

At the time of review, this Court made a plainly erroneous decision due to intervening authoritative and controlling legal decisions and precedent held consistently by this Court except in the Petitioners case.

Found in **Tex. Dept. of Hous. & Cmty Affairs v. Inclusive C. Project, Inc.,** 576 U.S.___, 135 S.Ct.___, 192 L.Ed 2d 514 (2015), this Court was of the opinion that "while we al;ways give respectful consideration to interpretations of statutes that garner wide acceptance in other courts, this Court has no warrant to ignore clear statutory language on the ground that other courts have done so,""even if they have" consistently "done so for"'30 years.' **Milner v. Department of Navy**, 562 U.S. 562, 575-576, 131 S.Ct. 1259, 179 L.Ed. 2d 268 (2011). see also, e.g., **CSX Transp., Inc. v. McBride**, 564 U.S.___, 131 S.Ct. 2630, 180 L.Ed. 2d 637 (2011) (explaining that this Court does not interpret statutes by asking for "a show of hands")(citing **Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources**, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed. 2d 855 (2001); **McNally v. United States**, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed. 2d 292 (1987)).

The Petitioner has clearly and consistently shown that the language of §53.1-202.2 Code of Virginia, is unambiguous and mandatory. He has further proven that the V.D.O.C. and its agents have rewritten the valid state statute so that it is contrary in intent and application. This clearly flies in the face of all rules of statutory interpretation and construction.

"Where a statutes language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not supplant those commands with others it may prefer." **SAS Inst. Inc., v. Iancu**, 584 U.S.___, 138 S.Ct.___, 200 L.Ed. 2d 695 (2018). The V.D.O.C. and the Director have changed the words "**every person**" found in the state law §53.1-202.2 C.O.V. to 'some people' found in O.P. 830.3 IV H 6, VI c. The V.D.O.C. also has changed the mandatory and unambiguous directive "**shall**" again found in §53.1-202.2 C.O.V. to the words

"shall not and "cannot" found in DOP 807.6 (5) and O.P. 830.3 IV H 6; VI (c).

The statutory provisions deliver unmistakeable commands. The state law, §53.1-202.2 C.O.V. specifically commands that "**Every person...Shall** be eligible to earn sentence credits" and once those credits are earned, they "**shall** equal a deduction...from a person's term of confinement." For every person who meets the established requirements, a specified outcome is mandated. There is no room in the statutory scheme for the wholly unmentioned "partial revisional" power that allows the V.D.O.C. and the director to rewrite, in policy, "every person" to 'some people' and "shall" to "shall not" and "cannot". The director may think (feel) that this "approach makes for better policy but policy considerations cannot create ambiguity where words on the page are clear." see: **SEC v. Sloan**, 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed. 2d 148 (1978). Neither may we defer to an agency officials' preferences because we imagine some "hypothetical reasonable legislator" would have taken that approach." **SAS Inst**. at 200 L.Ed 2d at 713. This Court's duty is to give effect to the text that approximately 140 legislators plus one Governor enacted into law.

§53.1-202.2 C.O.V., the state law in which the Petitioner was validly sentenced under, is clear, mandatory and unambiguous. "Every person...shall be eligible to earn sentnece credits" and once those credits are earned they "shall equal a deduction... from a persons term of confinement." The V.D.O.C. and the director have used their discretion, in the guise of policy, to change the all inclusive term "every person" to 'some people' and changed the mandatory term "shall" to the words "shall not" and "cannot". The fact that the statute is unambiguous means that there is "no gap for the agency to fill" and thus "no room for agency discretion." **United States v. Home Concrete Supply, LLC,** 566 U.S.___, 132 S.Ct. 1836, 182 L.Ed. 746 (2012). As this COurt noted in **Barnhart v. Sigmon Coal Company,** 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed. 2d 908 (2002) an agency lacked authority "to develop new guidelines... in a manner inconsistent with" an "unambiguous statute." In **Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.**, 467 U.S. 837, 842-43, 104 S.Ct. 2778,

81 L.Ed. 2d 694 (1984), this Court held that "we do not defer to the agency when the statute is unambiguous." see also: **Kingdomware Technologies v. United States**, 579 U.S.___, 136 S.Ct.___, 195 L.Ed. 2d 334 (2016).

This Court, by not granting the Petitioner's Petition for Writ of Certiorari, is deferring to an agency's contrary interpretation and application of a valid and unambiguous state law. This stance flies in the face of every ruling this Court has made in regard to statutory interpretation and application.

At the time of review, this Court again made a plainly erroneous decision due to intervening authoritative legal stances held consistently by numerous A.G.s for the state of Virginia and controlling and legal and authoritative precedent by the VA Supreme Court in regards to statutory interpretation and application.

In **SAS Inst. Inc., v. Iancu**, 584 U.S.___, 138 S.Ct. 1348, 200 L.Ed. 2d 695 (2016) which quoted **Social Security Board v. Nierotico**, 327 U.S. 358, 369, 66 S.Ct. 637, 90 L.Ed. 718 (1946), this Court held "where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not supplant those commands with others it may prefer."

In the V.D.O.C.'s and the director's views, they retain discretion to decide what the legislative intent truly is and which words to include and omit. This is evidenced where the term "every person" found in §53.1+202.2 C.O.V. was replaced with 'some people' found in OP 830.3 IV H 6; VI c and the term "shall" found in §53.1-202.2 C.O.V. was replaced with the words "shall not" and "cannot" found in DOP 807.6 (5) and OP 830.3 IV H 6; VI c. Nowhere in the statute or surrounding statutes is discretion given to the director or the V.D.O.C. to later or modify the mandatory and unambiguous language and intent. the director's and the V.D.O.C.'s revisionary power appears nowhere within any of the three statutes under Article 4 of Chapter 5; Title 53.1 of the Code of Virginia "Earned Sentence Credits for Person's Committed Upon Felony Offenses Committed on or After January 1, 1995." What can be found in the statutory text and context strnogly counsels that any and all policies

must conform with the purpose of this code section.

The Virginia Supreme Court in **Fishback v. Commonwealth**, 260 Va. 104, 114, 532 S.E. 2d 629, 633 (2000) ruled that "every person convicted of a non-capital felony offense committed on or after January 1, 1995, the provisions of...§53.1-202.2 are implicated..."

In an opinion of the Attorney General James S. Gilmore III, he stated "it is well settled that if the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it. It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous. In those situations the statute's plain meaning and intent govern." "I am of the opinion that the language of §53.1-202.3 is clear and unambiguous." **1995 Va. AG LEXIS 86; 1995 Op. Atty. Gen. Va. 221 Dec. 15, 1995.**

§53.1-202.3 C.O.V. is the second statute in the trio of statutes governing "Earned Sentence Credits for Person's Committed Upon Felony Offenses Committed on or After January 1, 1995." It uses the same mandatory and unambiguous language as its sister statute, §53.1-202.2 C.O.V.

Virginia Attorney General Mark Herring was of the opinion in **2014 Va. Ag. LEXIS 50 July 10, 2015**, that "moreover, the General Assembly clearly knows how to express its intent when it comes to permitting sentence reducing credits.""In addition, when the Legislature has intended for...credit to be unavailable to a prisoner serving a particular type of sentence, it expressly has said so." In discussing adults charged with juvenile offenses he continues to note "here, the General Assembly did not include in a provision...indicating that...credits would be unavailable to prisoners sentenced under that statutory provision. I therefore conclude that an adult sentenced to a term of imprisonment under" the statute fell "within the meaning of this statute as long as the other express terms of the legislative mandate are filled."

Yet another Attorney General for Virginia, Robert F. McDonnell discusses unambiguous language and the word "shall" in two separate opinions found at 2006 Va. AG LEXIS 21 No. 06-038 May 19, 2006 and 2005 Va. AG LEXIS 28 OP. No. 05-045 July 21, 2005. "When statutes are expressed in clear and unambigous languge, whether general or limited, it is presumed that the General Assembly means what it has plainly expressed and no room is left for construction." In defining clear and unambiguous language, "further, the use of the word "shall" in a statute...indicates that the procedures are intended to be mandatory. The primary objective in statutory construction is to ascertain and give effect to the legislative intent." In light of the use of the word "shall" the legislative intent is immediately ascertained and there is no room left for construction.

§53.1-202.2 C.O.V. expressly states that "every person...shall be eligible to earn sentence credits" and once those credits are earned they "shall be applied to equal a deduction...from a person's term of confinement." This is the legislative intent framed in mandatory and unambiguous language. The V.D.O.C. and the director, with the use of policy, have changed the language as well as the intent of its governing statute.

Robert F. McDonnell, A.G., rendered another opinion about statutory construction in 2006 Va. AG LEXIS 53 No. 06-088 December 21, 2006. In it, he stated that "the primary objective of statutory construction is to determine and give effect to the Legislature's intent. Courts may not "add language to the statue the General Assembly has not seen fit to include." Therefore, "the plain, obvious, and rational meaning of the statute is always to be preferred to any curious, narrow or strained construction.""Where the Legislature has carefully carved out persons ineligible..., the list may not be expanded. It is presumed that "the Legislature chose, with care, the words it used when it enacted the...statute..."" see: **Turner v. Commonwealth**, 226 Va. 456, 459, 309 S.E. 2d 337, 338 (1983); **Holsapple v. Commonwealth**, 266 Va. 592, 599, 587 S.E. 2d 561, 564-65 (2003); **Simon v. Forer**, 265 Va. 483, 490, 578

S.E. 2d 792, 796 (2003).

It has been the opinion of various Attorney Generals of Virginia as well as the Supreme Court of Virginia that "shall" indicates mandatory intent. It has consistently been the opinion that the General Assembly means what it has plainly expressed and that it is not for any agency to interpret and/or apply the words of the Legislature in any way other than mandated. It is also their opinion as well as that of the United States Supreme Court that the courts are bound by the plain meaning of the language and must not add words to or take away from the statute.

The Petitioner has shown that the opinions of the Attorney Generals of Virginia and the Supreme Court of Virginia support his stance in every case ruled upon except in this instance. They cannot selective apply the law because it may reach a result they did not intend. This Courts failure to adhere to the rules of statutory construction allow all substantial and controlling rulings prior to the Petitioners complaint to be rendered moot. In doing so, this Court has defied their own established principles of statutory construction and held that the Legislature did not mean what it so plainly stated. Furthermore, this Court has deferred to an agency interpretation.

Conclusion

Start where the statute does. In its very first sentence, the statute, clearly and expressly states that "**every person** who is convicted of a felony offense committed on or after January 1, 1995""**shall be eligible** to earn sentence credits..." §53.1-202.2 C.O.V. The language does not exclude any person or length of sentence, nor does it ask the V.D.O.C. and the director to contemplate who it feels should be omitted from this statute. Instead, the statute encompasses "**every person**" and grants to them that they "**shall be eligible** to earn sentence credits..." so long as they

follow the rules and regulations established. From the outset, you can clearly see that the legislature chose to structure the statute in such a manner in which "**every person...shall** be eligible to earn sentence credits..." and once they are earned they "**shall** equal a deduction...from a person's term of incarceration." These are the clearly expressed contours of §53.1-202.2 C.O.V. and "[j]ust as Congress' choice or words are presumed to be deliberate" and deserving judicial respect, "so too are its structual choices." **University of Tex. Southwestern Medical Center v. Nassar**, 530 U.S. 338, 353, 133 S.Ct. 2517, 186 L.Ed. 2d 503 (2013).

It is telling too, to compare this structure, §53.1-202.2 C.O.V. with its predecessor §53.1-199 C.O.V. Both dealing with forms of sentence credits but each dealing with a different system of those. §53.1-202.2 C.O.V governs the earned sentence credits for those convicted of felony offenses committed on or after January 1, 1995 and §53.1-199 governs the good conduct credits for those convicted of felony offenses committed before January 1, 1995.

§53.1-202.2 C.O.V., which regulates those convicted of felony offenses committed on or after January 1, 1995, specifically stipulates that "**every person...shall be eligible** to earn sentence credits" and once those credits are earned they "**shall** equal a deduction from a person's term of incarceration."

§53.1-199 C.O.V., which regulates those convicted of felony offenses committed before January 1, 1995, on the otherhand, only states that a person "**may**" earn sentence credits and it specifically limited how much credit could be earned due to the length of sentence and/or type of crime. The Virginia Legislature took into account various circumstances and addressed them in the form of a state statute. "unlike the word "may", which implies discretion, the word "shall"...connotes a requirement." compare **Lexecon Inc. v. Milberg Weiss Bershard Hynes & Lerach**, 523 U.S. 26, 35, 118 S.Ct. 956, 140 L. Ed. 2d 62 (1998)(recognizing that "shall" is "mandatory" and creates an obligation impervious to judicial discretion.") with

United States v. Rodgers, 461 U.S. 677, 706, 103 S.Ct. 2132, 76 L.Ed. 2d 236 (1983) (explaining that "[t]he word 'may' when used in a statute...implies some degree of discretion.") Even the Virginia Supreme Court has established that "properly understood, a 'shall' command in a statute always means 'shall', not 'may'. No litigant or court should willfully disregard such a legislative command." **Rickman v. Commonwealth**, 294 Va. 531, 537, 808 S.E. 2d 398 (2017) see also: **City of Va. Beach v. Va. Marine Res. Comm'n**, 2018 Va. App. Lexis 231 (2018).

If the Virginia Legislature had wanted to limit the ability to earn credit, for whatever reason, be it length of time or type of crime, it knew exactly how to do so. This is evidenced with the creation of the state law, §53.1-199 that limited the amount of credit earned due to length of sentence and/or type of crime. The Virginia Legislature could have created something akin to such statute and placed it within §53.1-202.2 C.O.V. or created its own statute. Instead, the V.D.O.C. and the director did so in the form of policy contrary in language and intent to its governing statute. The V.D.O.C. and director tried to correct a legislative and judicial oversight in creating policy that they are not authorized to do.

Again, if the legislative intent to exclude 'some people' from the "**every person**" provision, it knew exactly how to do so. Compare §53.1-202.2 C.O.V. ("Every person.. shall be eligible to earn sentence credits...(1995)) with §53.1-199)"Any person... who has been sentenced to a term of life...shall be eligible for no more than... (1981)). If it had been the legislative intent that "**shall**" should really mean "**shall not**" and "**cannot**", it would have expressly stated so. Compare §53.1-202.2 C.O.V. ("**Every person...shall be eligible** to earn sentence credits...(1995)) with DOP 807.6 (5) ("An inmate serving...**shall not** earn ESC" (1995)) and OP 830.3 VI H (6) ("An offender serving...**cannot** earn ESC" (2019)).

The V.D.O.C. and the director have rewritten and adopted regulations in which none of the statutes have afforded them the discretion to do so. see: §53.1-202.2-

202.4 C.O.V. The text of §53.1-202.4 states that the board may only establish additional requirements that are "consistent with the purpose of this article." That purpose being "earned sentence credits for person's committed upon felony offenses committed on or after January 1, 1995." The text of the statute does not state that the 'board may or shall establish regulations that are incongruent with and contrary to the mandatory language and intent of this article.'

The V.D.O.C. and the director have employed the policy argument, completely ignoring the statute's text, context and mandatory intent. This is evidenced by the very existence of policy that is in direct conflict in language and intent with its governing statute. They have subscribed to the ideal that the regulations were not only enacted because the authority was granted to them but also because that it was clearly the legislative intent. They chose to correct what they felt was an error made by the legislative and judicial branch and that approximately 140 legislators and 1 governor failed to notice. There is no ambiguity present within the carefully chosen words of the legislature, thus calling for any other interpretation via regulation/policy, to discern the legislative meaning. Even after applying traditional tools of statutory construction and interpretation, one is left with no uncertainty that could warrant deference to an agency's interpretation. The statutory language and provisions deliver unmistakeable commands, "**every person... shall be eligible** to earn sentence credits..." and once those credits are earned they "**shall** equal a deduction...from a person's term of incarceration." §53.1-202.2 C.O.V. The statute is unambiguous and deferring to an agency's interpretation that 'some people' "shall not earn sentence credits" and "cannot earn sentence credits", is allowing an agency to create rules and regulations as it sees fit and outside the purview of the law. Thus creating countless stautory and constitutional violations. Whenever a policy or regulation conflcits with a statute, that statute must prevail.

"In the context of an unambiguous statute, the United States Supreme Court need not contemplate deferring to the interpretation of the statute by the

administrative agency that is charged with implementing the statute." see: Chevron USA Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). This Court cannot ignore the complexity of the problems created by the V.D.O.C. and the director. This Court also cannot ignore the consistent intervening and controlling legal decisions and precedent held by this very Court in every case prior to the Petitioners case. This Petition for Rehearing is presented in good faith and not for delay.

Respectfully Submitted,

M. #1162945

Date: 8/2/19