No. 18-8973

ORIGINAL

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 A WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Joshua Mitch Johnson, #1162995

Pocahontas State Correctional Center

P.O. Box 518

Pocahontas, Virginia 24635

Pro Se Petitioner

QUESTIONS PRESENTED

1) §53.1-202.2 Code of Virginia reads as follows: "Every person who is convicted of a felony offense committed on or after January 1, 1995, and who is sentenced to serve a term of incarceration in a state or local correctional facility shall be eligible to earn sentence credits in the manner prescribed by this article. Such eligibility shall commence upon the person's incarceration in any correctional facility following entry of a final order of conviction by the committing court. As used in this chapter, "sentence credit" and "earned sentence credit" mean deductions from a person's term of confinement earned through the rules prescribed to §53.1-25, through program participation as required by §§ 53.1-32.1 and 53.1-202.3, and by meeting other such 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...(1994, 2nd Sp. Sess., cc. 1.2.)" The question presented is has the Petitioner been validly sentenced under this statute, therefore being encompassed by this?

2) §53.1-202.2 Code of Virginia specifically stipulates that "every person who is convicted of a felony offense committed on or after January 1, 1995 and who is sentenced to serve a term of incarceration in a state or local correctional facility..." The question presented by the Petitioner is is the Petitioner one of "every person who is convicted of a felony offense committed on or after January 1, 1995 and who is sentenced to serve a term of incarceration.."?

3) The Supreme Court of the United States has held that a state law may create enforceable liberty interests in the prison setting. **See: Board of Pardons v. Allen; Greenholtz v. Nebraska Penal Inmates; Wolff v. McDonnell;** and **Vitek v. Jones.**(1) The question presented by the Petitioner is with the use of the explicitly mandatory term "shall" in §53.1-202.2 C.O.V., has a liberty interest been created pursuant to those standards?

4) According to **Wolff v. McDonnell**, 418 U.S. 539, 41 L.Ed.2d 905, 94 S.Ct. 2963 (1974), "[t]he state having created the right to good time and itself recognized that its deprivation is a sanction for major misconduct, prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment." The question presented is with the use of explicitly mandatory language in the governing statute §53.1-202.2 C.O.V., has the state created a right to good time (earned sentence credits) that cannot be taken away without minimal due process, therefore sufficiently embracing the Petitioner's interest within the Fourteenth Amendment in accordance with the **Wolff** standard?

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(1) **Board of Pardons v. Allen**, 482 U.S. 369, 96 L.Ed.2d 303, 107 S.Ct. 2415 (1987)
Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 60 L.Ed.2d 668, 99 S.Ct. 2100 (1979)
Wolff v. McDonnell, 418 U.S. at 556-572, 41 L.Ed.2d 905, 94 S.Ct. 2963 (1974)
Vitek v. Jones, 445 U.S. at 487-494, 63 L.Ed.2d 552, 100 S.Ct. 1254 (1980)

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioner: Joshua Mitch Johnsons #1162995, Pro Se Petitoner

Respondent/Defendant: Harold W. Clarke, Director for the Virginia Department of Corrections.

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IN THE

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For the cases from **state courts:**

1) The opinion of the Supreme Court of Virginia upon the Petitioner's **Petition for Rehearing**, appearing at **Appendix A** is unpublished.

2) The opinion of the Supreme Court of Virginia on **Appeal** from the Circuit Court of Grayson County, appearing at **Appendix B** is unpublished.

3) The opinion of the Circuit Court for Grayson County on Petitioner's **Motion for Declaratory Judgment**, appearing at **Appendix C** is unpublished.

JURISDICTION

For the cases from the **state courts:**

1) The date on which the highest state court decided my case on October 20, 2017. A copy of that decision appears at **Appendix B.**

2) A timely petition for rehearing was thereafter denied on January 19, 2019 and a copy of the order denying rehearing is found at **Appendix A.**

Pursuant to 28 U.S.C.S §1257(a) and 28 U.S.C.S. §2101, this Honorable Court has jurisdiction in this case and the Petitioner has timely filed his motion for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Amendment XIV to the United States Constitution, which provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United states and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

This case also involves §53.1-202.2 Code of Virginia, which provides:

Every person who is convicted of a felony offense committed on or after January 1, 1995, and who is sentenced to serve a term of incarceration in a state or local correctional facility shall be eligible to earn sentence credits in the manner prescribed by this article. Such eligiblity shall commence upon the person's incarceration in any correctional facility following entry of a final order of conviction by the committing court. As used in this chapter, "sentence credit" and "earned sentence credit" mean deductions from a person's term of confinement earned through the rules prescribed to §53.1-25, through program participation as required by §§53.1-32.1 and 53.1-202.3, and by meeting other such 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. (1994, 2nd Sp. Sess., cc. 1.2.)

STATEMENT OF THE CASE

On September 18, 2016, the Petitioner, Joshua Mitch Johnson #1162995, herein after "Johnson", filed with the Grayson County Circuit Court a **Motion for Declaratory Judgment.** Johnson requested of the Court to either declare a prison policy or its governing statute VOID, due to their conflicting language and intent.

Johnson contended that he was validly sentenced under §53.1-202.2 Code of Virginia (C.O.V.) which stated in part that "Every person who is convicted of a felony offense committed on or after January 1, 1995 and who is sentenced to serve a term of incarceration in a state or local correctional facility shall be eligible to earn sentence credits in the manner prescribed by this article." The law further goes on to mandatorily stipulate what **"shall"** happen once certain criteria are met. The prison policy complained of, Operating Procedure ("OP") 830.3, specifically OP 830.3 IV B 4(a); V H 5(b) and VIII C and its predecessor Division of Operating Procedure ("DOP"), specifically 807-7.6 (5) stipulates that certain people "shall not earn...' and that once certain criteria are met, the assured guarantees of their governing law "shall not" happen. This was the crux of Johnson's case.

On March 15, 2017 Johnson requested **Declaratory Judgment** be entered in his favor for the defendant had failed to respond.

On March 30, 2017 the Court stated that it had failed to perfect service and it re-served the defendant though Johnson had proven that he had properly perfected service on the defendant on September 18, 2016.

On May 17, 2017 the Office of the Attorney General filed a **Demurrer, Plea in Bar and Motion to Dismiss.** It stated that because Johnson had failed to state a claim for which relief could be granted, because the defendant was entitled to sovereign immunity, because Johnson was time barred and because Johnson's claims lacked merit, his claim should be dismissed.

On May 25, 2017, Johnson immediately filed a **Motion in Opposition to Respondent's Demurrer, Plea in Bar and Motion to Dismiss.** Johnson contended that Declaratoy Judgment was the proper vehicle for it is "a binding adjudication that establishes the right and other relations of the parties without providing for or ordering enforcement." Johnson further showed that any immunity defense was unavailable under the **Wood v. Strickland** rule and that under **James v. Jane**, 221 Va. 43, 267 S.E.2d 108 (1980), no part of the required four-pronged test was even attempted to be met. They simply claimed sovereign immunity. Johnson proved that because the violations complained of occured annually, they gave rise to the continuing violation doctrine. Johnson further demonstrated that there was an actual justiciable controversy.

On August 31, 2017 Johnson wrote to the Court asking to the status of the case. The Court responded that it had received no order from the Plaintiff or the defendant.

On September 19, 2017 Johnson filed a pre-drafted order with the Court and the Attorney General's Office dismissing the demurrer, plea in bar and motion to dismiss as well as an order granting the motion for declaratory judgment.

On September 29, 2017 the Court gave the Office of the Attorney General 21 days to file a pre-drafted order.

On October 12, 2017 the defendant filed the proposed pre-drafted order dismissing the Plaintiff's motion for Declaratory Judgment.

On October 25, 2017 the Court signed the defendant's pre-drafted order dismissing the Plaintif's Motion for Declaratory Judgment.

On November 8, 2017, Johnson filed with Grayson County Circuit Court and the Office of the Attorney General a **Notice of Appeal.**

On December 19, 2017 Johnson filed with the Supreme Court of Virginia and the Office of the Attorney General a **Petition for appeal**, citing four (4)

assignments of error. Johnson contended that the Court had erred stating that the issuance of declaratory relief would be inappropriate. He contended that the Circuit Court erred in granting sovereign immunity to an official who's actions taken were ministerial acts and that none of the elements of the **James v. Jane** test were satisfied. He further contended that the court erred in claiming he was time barred. Lastly he contended that the Court erred in siding with the defendant's stance that their failure to apply the law as mandated because they did not know how to apply the law did not violate the law and its mandates.

On June 4, 2018 Johnson informed the Court that he had recently been moved to a lower level security institution and also asked the status of the case. Johnson was informed that the case was still pending.

On October 22, 2018 the Court decided that there was no reversible error and refused the Petition for Appeal.

On November 1, 2018 Johnson filed a **Motion for Rehearing** with the Supreme Court of Virginia and the Attorney General's Office. Johnson again cited errors of the Court, where reversible error lay and that many of the points raised in the claims had been adjudicated and deemed reversible in the very Court in which he was seeking relief.

On November 9, 2018 the Supreme Court of Virginia notified Johnson that he had failed to timely file his Motion for Rehearing.

Due to the insitutional mailroom not properly following certain procedures, Johnson had to prove to the Court that he indeed had timely filed. In two (2) letters dated November 14, 2018 and November 19, 2018, Johnson included a timeline as well as an affidavit proving that the Motion for Rehearing had been placed in the institutional mailbox and timely filed.

On January 31, 2019, Johnson's Motion for Rehearing was denied.

REASONS FOR GRANTING PETITION

1) §53.1-202.2 Code of Virginia reads as follows: "Every person who is convicted of a felony offense committed on or after January 1, 1995, and who is sentenced to serve a term of incarceration in a state or local correctional facility shall be eligible to earn sentence credits in the manner prescribed by this article. Such eligibility shall commence upon the person's incarceration in any correctional facility following entry of a final order of conviction by the committing court. As used in this chapter "sentence credit" and "earned sentence credit" mean deductions from a person's term of confinement earned through the rules prescribed to §53.1-25, through program participation as required by §§53.1-32.1 and 53.1-202.3, and by meeting other such 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...(1994, 2nd Sp. Sess., cc. 1.2.)" The question presented is has the Petitioner been validly sentenced under this statute, therefore being encompassed by this?

The Petitioner, Joshua Mitch Johnson #1162995, herein ("Johnson"), committed his crimes in March of 1995. He was then convicted of these crimes on October 24, 1995 and then sentenced on October 24, 1995. On December 19, 1995, Johnson was received into the Virginia Department of Corrections. The Supreme Court of Virginia, in a span of nearly two decades has cited **Fishback v. Commonwealth**, 260 Va. 104, 532 S.E.2d 629 (2000) in ten cases. Over this span, of nearly two decades, there have only been three cases which have set the legal landscape in relation to the interpretation and application of §53.1-202.2 C.O.V. The first in line to setting the tone was found in **Fishback v. Commonwealth**.

In **Fishback**, the Supreme Court of Virginia considered at length, and in great detail, the proper interpretation of §53.1-202.2 C.O.V. as well as its proper application and found that,

> "Indeed, for every person convicted of a non-capital felony offense committed on or after January 1, 1995, the provisions of Code §53.1-40.1 and Code §53.1-202.2 et seq. are implicated and conditionally provide for forms of early release and sentence reduction."

Id. 260 Va. at 114, 532 S.E.2d at 633.

Moreover, it is important to note that the Court in **Fishback**, noted that a life sentence is a "term" of incarceration stating,

"Pertinent to the present case, for example, §18.2-58 provides for a range of punishment between a term of life to any term not less than five years."

Id. 260 Va. at 113, 532 S.E.2d at 633.

This is also held by this very Court in Simmons v. South Carolina, 512 U.S. 154, 129 L.Ed.2d 133, 114 S.Ct. 2187 (1994) where it was noted that,

"For much of the country's history, parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term of years) in practice was understood to be shorter than stated term."

§53.1-202.2 C.O.V. states in part "**Every**[1] **person**[2] who is convicted of a felony offense on or after January 1, 1995, and who is sentenced to serve a **term**[3] of **incarceration**[4] in a state or local correctional facility **shall**[5] be eligible to earn sentence credits in the manner prescribed by this article."

§53.1-202.2 C.O.V. goes on and further states that once that credit is earned,

"One earned sentence credit **shall**[5] equal a deduction of one day from a person's **term**[3] of **incarceration**[4]."

Fishback, stipulated that a felony offense, found in §53.1-202.2 C.O.V., must be a **non-capital felony offense**[6]. Id. 260 at Va., at 114, 532 S.E.2d, at 633. "Indeed, for every person convicted of a non-capital felony offense committed on or after January 1, 1995..."

American Heritage Dictionary, 2nd College Ed.

1) **Every**-Constituting each and all memebers of a class without exception.
2) **Person**- A living human being, esp. as distinguished from an animal or thing.
3) **Term**- A limited period of time during which something lasts.

Black's Law Dictionary, 7th Ed.

4) **Incarceration**- The act or process of confining someone.
5) **Shall**- Is entitled to <the secretary shall be reimbursed for all expenses>
6) **Capital Offense**- A crime for which the death penalty may be imposed.

The Supreme Court of Virginia has ruled on who the provisions of §53.1-202.2 C.O.V. are provided for. The Supreme Court of Virginia has encompassed Johnson because his crimes did not include a capital felony offense.

The next case in which the Supreme Court of Virginia interpreted §53.1-202.2 C.O.V. was in **Bell v. Commonwealth**, 264 Va. 172, 563 S.E.2d 695 (2002). Consistent with its earlier interpretation, the **Bell**, court found,

> "With regard to the issue of sentencing credits under Code §53.1-202.2 we recognized in **Fishback** that a defendant's eligibility for this type of early release **remains dependant upon** the prisoner's conduct and participation in various programs established by the Department of Corrections, and the executive branch's subjective assessment of that conduct and participation."

Id. 264 Va. at 206-207, 563 S.E.2d at 717-718.

Consistent with the **Fishback** interpretation of §53.1-202.2 C.O.V., the only exceptions to this state law is a person convicted of a capital felony offense. The **Bell** court found that,

> "Unlike the defendant in **Fishback**, Bell's conviction of capital murder precludes the possibility of his earning sentence credits."

Id. 264 Va. at 207, 563 S.E.2d at 718

Accordingly, the highest court in the Commonwealth of Virginia remained consistent in its interpretation and application of §53.1-202.2 C.O.V. in **Fishback** in 2000 and again in **Bell** in 2002. However, when Johnson asked for the state law to be applied not only as it is mandatorily written but also as the Supreme Court of Virginia has ruled, the court chose not to follow its own precedent.

The last and most recent case out of the Supreme Court of Virginia with regard to the interpretation and application of §53.1-202.2 C.O.V. was **Booker v. Commonwealth**, 276 Va. 37, 661 S.E.2d 461 (2008). The Court in **Booker** reiterated the holdings of **Fishback** and **Bell** which

> "held that juries should not be instructed on the issue of earned sentence credits that a prisoner may obtain under §53.1-202.2 through 202.4, because

> obtaining these credits **depends upon** [1] a prisoner's conduct while incarcerated, [2] on his participation in certain programs established by the Department of Corrections, and [3] on the executive branch's subjective assessment of the prisoner's progress."

Id., 276 Va. at 42, 661 S.E. 2d, at 463 (emphasis and alterations added). The "subjective assessment of the prisoner's progress" is better known as "Class Levels I, II, III, IV."

After reviewing the decisions of the Supreme Court of Virginia relating to Code §53.1-202.2, it is abundantly clear that the highest court in the Commonwealth of Virginia has interpreted §53.1-202.2 C.O.V. consistently for nearly two decades. Indeed, the highest court of the state has interpreted the statute to include every person convicted of a non-capital felony offense committed on or after January 1, 1995. Moreover, obtaining the credits the offender is entitled to under §53.1-202.2 C.O.V. 'depends on;' (1) a prisoner's conduct; (2) the prisoner's participation in certain programs; and (3) the Department of Corrections assessment of the prisoner's progress as reflected in the prisoner's 'Class Level' assignment.

Article 4 of Chapter 5; Title 53.1 of the Virginia Code is clear, "Earned Sentence Credits for Persons Committed Upon Felony Offenses Committed on or After January 1, 1995." Virginia Code §53.1-202.2 is the first, and clearly the most prominent statute under this Article. It could not be more clear in its terms "**Every person** who is convicted of a felony offense committed on or after January 1, 1995 and who is sentenced to serve a term of incarceration... **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." Nowhere in the subsequent statutes is there any authority given to the Board of Corrections or the Department of Corrections to exclude any person, including the Petitioner from the "Every person...shall be eligible to earn..." and once earned, "shall equal a deduction..." provisions of this statute.

2) §53.1-202.2 Code of Virginia specifically stipulates that "Every person who is convicted of a felony offense committed on or after January 1, 1995 and who is sentenced to serve a term of incarceration in a state or local correctional facility..." The question presented by the Petitioner is is the Petitioner one of "Every Person who is convicted of a felony offense committed on or after January 1, 1995 and who is sentenced to serve a term of incarceration..."?

On March 6, 1995, Johnson committed his crimes. On March 7, 1995, Johnson was taken into custody and formally charged. On June 23, 1995, Johnson was convicted of the crimes he was charged with. On October 24, 1995, Johnson was sentenced to a term of incarceration and on December 19, 1995, Johnson was received into the Virginia Department of Corrections at Southhampton Receiving Center.

§53.1-202.2 C.O.V. stipulates that "Every person who is convicted of a felony offense committed on or after January 1, 1995..." Johnson is a person who committed a felony offense(s) on March 6, 1995. That is clearly after the statutorily mandated January 1, 1995.

§53.1-202.2 C.O.V. stipulates that "Every person who is convicted of a felony offense committed on or after January 1, 1995 and who is sentenced to serve a term of incarceration in a state or local correctional facility..." Johnson is a person who committed a felony offense(s) on March 6, 1995 and on October 24, 1995 he was sentenced to a term of incarceration in a state facility. October 24, 1995 is also after the statutorily mandated "on or after January 1, 1995...", therefore Johnson is encompassed by §53.1-202.2 C.O.V.. Johnson is one of "every person" who committed his felony offense "on or after January 1, 1995" and who was sentenced to serve a "term of incarceration" after January 1, 1995. In being encompassed by §53.1-202.2 C.O.V., Johnson and his sentence are subject to all of the provisions found in the state law and it entitles him to all of the rights conveyed therein. **"One earned sentence credit shall equal a deduction of one day from a persons term of incarceration."** The mandatory and

unambiguous language has created a protectable entitlement and is to be applied equally to "**Every person** who is convicted of a felony offense committed on or after January 1, 1995." §53.1-202.2 C.O.V.

3) The Supreme Court of the United States has held that a state law may create enforceable interests in a prison setting. See: Board of Pardons v. Allen; Greenholtz v. Nebraska Penal Inmates; Wolff v. McDonnell; Vitek v. Jones. The question presented by the Petitioner is with the use of the explicitly mandatory term "shall" in §53.1-202.2 C.O.V., has a liberty interest been created pursuant to those standards?

"'Mandatory language' often means words like "shall","will", or "must"." **Board of Pardons v. Allen**, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed. 2d 303 (1987); **Kentucky Dept. of Corrections v. Thompson**, 490 U.S. 454, 109 S.Ct. 1940, 104 L.Ed 2d 506 (1989).

§53.1-202.2 C.O.V. in part specifically stipulates "every person...shall be eligible to earn sentence credits..." and that once those credits are earned, they "shall" be applied to "equal a deduction...from a person's term of incarceration."

It is well established by this Court that the word "shall" is a directive for what is to be done. §53.1-202.2 C.O.V. with its use of explicitly mandatory and unambiguous language, has created not only the opportunity to earn sentence credits, but to also have those credits applied once earned, if they are earned. The explicitly mandatory and unambiguous language delineates specifically, the interest to be protected.

In order to create a liberty interest protected by the Fourteenth Amendment of the United States Constitution, a law must set forth substantive predicates to govern official decisionmaking, it must contain explicitly mandatory language as a specific directive to the decisionmaker that mandates a particular outcome if the substantive predicates are met.

Explicitly mandatory language has been used with the use of the terms

"every person" and "shall" found in §53.1-202.2 C.O.V. The legislative intent is clear and they have created a binding and definite liberty interest protected by the Due Process Clause.

"One earned sentence credit **SHALL** equal a deduction of one day from a person's term of incarceration." §53.1-202.2 C.O.V. This is a clear and specific directive to the decisionmaker that mandates a particular outcome if the subsantive predicates have been met. §53.1-202.2 C.O.V. stipulates that the substantive predicates must be achieved by following the "rules prescribed by §53.1-25, through program participation as required by §§ 53.1-32.1 and 53.1-202.3 and by meeting other such requirements as may be established by law or regulation." This is how earned sentence credits are earned and "One earned sentence credit shall equal a deduction of one day from a person's term of incarceration." §53.1-202.2 C.O.V. This is a clear and specified outcome from which decisionmakers are not free to depart from.

Since 1995, Johnson has been consistently placed into an Earned Sentence Credit earning level in which 'eligible' offenders earn the credits as mandated by law. (**See:** Exhibit A). Yet Johnson is only awarded those levels for recognition purposes only pursuant to the policies complained of (**See:** Exhibit B and Exhibit C). The law does not mandate that some shall only be recognized for rules and regulations and for program participation, nor does the the law delegate to the V.D.O.C., the authority to rewrite the language and intent of its mandatory intent. §53.1-202.2 C.O.V. specifically stipulates that "**Every person...shall be eligible** to earn sentence credits..." and that once that credit is earned they "**shall** equal a deduction...from a person's term of incarceration."

The Virginia State legislature has created a right to earned sentence

credits. Not only in the ability to earn those credits, but once they are earned, they "**shall**" be applied to equal a deduction from a persons term of confinement. This is the right held in **Wolff v. McDonnell**, 418 U.S. at 556-572, 41 L.ed. 2d 905, 94 S.Ct. 2963 (1974), which is still the standard today. The state legislature also authorized that credits earned shall be lost for major misconduct. This too was the standard set forth in **Wolff** and in doing so, the "prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty'...".

4) According to Wolff v. McDonnell, 418 U.S. 539, 41 L.Ed. 2d 905, 94 S.Ct. 2963 (1974), "[t]he state having created a right to good time and itself recognized that it's deprivation is a sanction for major misconduct, prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment." The question presented is with the use of explicitly mandatory language in the governing statute §53.1-202.2 C.O.V., has the state created a right to good time (earned sentence credits) that cannot be taken away without minimal due process, therefore sufficiently embracing the Petitioner's interest within the Fourteenth Amendment in accordance with the Wolff standard?

The Supreme Court has said that deprivations that are less severe or more closely related to the original terms of confinement nonetheless will amount to deprivations of procedurally protected liberty, provided that state law narrowly cabins the legal power of authorities to impose the deprivation, thereby giving the inmate a kind of right to avoid it. **See: Kentucky Dept. of Corrections v. Thompson**, 490 U.S. 454, 461, 104 L.Ed.2d 506, 109 S.Ct. 1904, 1908-1909 (1981) ("Method of inquiry...always has been to examine closely the language of the relevant statutes and regulations."); **Board of Pardons v. Allen**, 482 U.S. 369, 382, 96 L.Ed.2d 303, 107 S.Ct. 2415, 2422-2423 (1983)(Insisting upon "standards that place real limits on decisionmaker discretion.")

The Supreme Court has "distinguished **Wolff** by noting that there the protected liberty in good time credit had been created by state law." **Sandin v. Conner**, 515 U.S. 472, 132 L.Ed.2d 2418, 115 S.Ct. 2293, 2297 (1995).

The "Court today reaffirms that the 'liberty' protected by the Fourteenth Amendment includes interests that state law may create." **Sandin**, supra, 115 S.Ct. at 2300.

The rate at which every person earns Good Conduct Allowance (GCA)(which was the credit system prior to January 1, 1995 and is only available to those sentenced after July of 1981 up until December 31, 1994) and Earned Sentence Credits (ESC) does not create an interest in avoiding changes in the classification alone since it is subject to change based upon the exhibited behavior of an offender. This is reviewed annually or as needed if negative behavior calls for it. Based upon an offender's own behavior or misbehavior for violations of prison rules and regulations or for failure to participate in programs, discretion is given to prison officials. This disruptive behavior necessitates the need for these prison officials discretion to punish the offenders accordingly and this is done through an internal prison disciplinary hearing(s) process. (**See**: Exhibit D). This hearing is where minimal due process is provided and if found guilty of an infraction or infractions, a penalty or penalties are levied, including a loss of good time or earned sentence credits.

Johnson has never received a disciplinary infraction, nor a disciplinary hearing calling for the revokation of any or all of his earned sentence credits. There has been no periodic changes to the rate at which he earns sentence credits for his consistent behavior in following the rules and regulations have been noted annually at his annual review cycle and he has consistently been assigned to a class earning level III, which 1.5 days of Earned Sentence Credits are earned for every 30 days served.

Offenders may have no interest in maintaining a particlar ESC earning rate due to an offenders changing behavior, but when an offender's behavior is unchanging, and noted annually by maintaining a particular ESC earning

rate, such as Johnson, his liberty interests are protected by the Due Process Clause for which that ESC earning rate allows. As seen in Exhibit A, Johnson has consistently been assigned to an ESC earning level III, at which offenders earn earn 1.5 days of credit for every 30 days served. This classification of Johnson, by his own positive behavior in following the rules and regulations and with the prison officials own concurrance, has not been subject to change, thereby entitling Johnson to the liberty interests as mandated by the law, §53.1-202.2 C.O.V. "One earned sentence credit **shall equal a deduction** of one day from a person's term of incarceration." Johnson is then afforded the procedural Due Process protections held in **Wolff** supra. A regulation barring punishment unless an inmate broke disciplinary rules, combined with the mandatory procedural regulations and mandates, create a liberty interest proteceted by the Due Process Clause.

Johnson's claims fall squarely within the purview of **Wolff**, supra. Virginia Code §53.1-202.2 specifies that once any credit is earned, it "**shall** equal a deduction..." The attorney General's office conceded that Johnson has been consistently assigned to, since 1995, an ESC earning level III. Based upon his own positive behavior and maintaining this earning level, it has given rise to a "right of real substance and is sufficiently embraced within the Fourteenth Amendment." **Wolff**, supra. 94 S.Ct. 2975. Clearly, the statute under which Johnson was sentenced, §53.1-202.2 C.O.V. creates the right to have his ESC credits applied once earned, evidenced by the mandatory unambiguous language. §53.1-202.2 C.O.V. delineates specifically the interest to be protected. "One earned sentence credit shall equal a deduction of one day from a person's term of incarceration." It has been held by every court in the nation, including this Court, that in deciding questions of statutory interpretation, if the language is clear and unambiguous, then the courts are duty bound to give

effect to that language.

The liberty interest here is one created by the state through state law. When a liberty interest is created by the state, it follows that the state can, within reasonable and constitutional limits, control the contours of the liberty interest it creates. The V.D.O.C. has interpreted, with policies, these limitations to be something contrary to which they are explicitly mandated, simply because this is the usual D.O.C. practice. The policies found in DOP 807-7.6(5) and its successor OP 830.3 IV B 4(a); V H 5(b) and VIII C (**See:** Exhibit B and Exhibit C) have rewritten the mandatory language and intent of its governing statute in an attempt to correct a "perceived" legislative oversight in affording "**every person**" the opportunity to earn sentence credits and to have those credits applied to "**equal a deduction**" from a person's term of confinement. §53.1-202.2 C.O.V. This is not a power afforded to the V.D.O.C. or any of its agents. The only authority granted to the V.D.O.C. must be "consistent with the purpose of this article." §53.1-202.4 C.O.V. The purpose of Article 4 of Chapter 5; Title 53.1 of the Virginia Code is clear "Earned Sentence Credits for Person's Committed Upon Felony Offenses Committed On Or After January 1, 1995."

The V.D.O.C. has circumvented the guaranteed due process procedures and minimal due process protections with the creation of policies contrary in language and intent to their governing law, thus arbitrarily abrogating Johnson's rights and being in direct conflict with the procedures and protections set forth in **Wolff**. This was done when the policies stated that 'some people...' **shall not** earn ESC, when the state law states that "Every person **shall be eligible** to earn sentence credits..." §53.1-202.2 C.O.V. This is specifically mandated by the law and the V.D.O.C. has circumvented this and taken away the ability and opportunity, as mandated by law, to earn any credits, thus

no longer providing any form of due process procedure for the automatic revocation of sentence credits. Credits lost are a sanction for major misconduct as seen in Exhibit D. According to the state law "Every person...shall be eligible to earn sentence credits..." This cannot be denied to any person who is convicted of a felony offense committed on or after January 1, 1995. **Wolff** has held that a formal due process hearing must be held in the revocation of any and all credits earned but the V.D.O.C. has removed that right guaranteed. Johnson's rights are sufficently embraced within the Fourteenth Amendment where the state law has created not only the ability for "every person" to earn sentence credits but also the right to have those credits once earned applied to "equal a deduction" from a person's term of incarceration. This was done with the use of explicitly mandatory and unambiguous language used by the legislature to unequivocally convey its intent. These rights are protected by the Due Process Clause and the V.D.O.C. has removed those rights and denied Johnson the liberty interest granted to him by the governing state law for following the rules and regulations and maintaining positive behavior while incarcerated. This is in direct conflict with the standard set forth by this Court in **Wolff** and countless others since.

DISCOURSE ON TRUTH-IN-SENTENCING

On January 1, 1995, with the implementation of §53.1-165.1 Code of Virginia, parole was abolished for all offenders who committed felony offenses on or after January 1, 1995. This was part of the three part Truth-In-Sentencing reform package. (See: Commonwealth of Va. Comm'n on Sentencing & Parole Reform, Report of the Commission on Sentencing & Parole Reform to the Governor and General Assembly of Virginia, H. Doc. No. 18 December 23, 1994) The primary goal of the Truth-In-Sentencing reform package was to close the gap between an offender's original sentence and the amount of time they actually served. (See: Brian J. Ostrom et. al., Truth In Sentencing in Virginia 17-20 (April 5, 2000)). **i.e.** An offender who was sentenced to twenty (20) years on or after January 1, 1995, though ineligible for parole, will serve, at the very minimum, approximately 17 years with minimal sentence reduction in the form of Earned Sentence Credits (E.S.C.). This is for following the rules and regulations as well as for completing schooling and various courses and programs. Whereas, prior to January 1, 1995, if an offender was sentenced to twenty (20) years, that offender would be eligible for parole as early as four and a half (4 1/2) years into his sentence and at the very maximum would serve approximately twelve (12) years with sentence reduction in the form of Good Conduct Allowance (GCA).

Also, as part of the Truth-In-Sentencing reform package, there was to be a sentencing commission established as well as uniform sentencing guidelines set because there were too many disparities among sentences imposed upon similarily situated offenders.

Virginia attempted to follow the model established for the Bureau of Prisons in 18 U.S.C.S. §3551 known as the Sentencing Reform Act of

1984 (S.R.A.). Congress passed the S.R.A. because the existing indeterminate sentencing system resulted in serious disparities among the sentences imposed upon similarily situtated offenders and an uncertainty as to an offenders actual release by the executive branch's parole officials. Inter alia, this created the United States Sentencing commission as an independant body in the judicial branch with the power to promulgate binding sentencing guidelines for establishing a range of determinate sentences for all catagories of offenses and offenders.

The great variation among sentences as well as the uncertainty of time the offender would serve in prison, created a serious impediment to the orderly and effective operation of the criminal justice system. In lieu of this, a concept was formulated that 1) helped establish order within the penal system by giving offenders a realistic release date, impelling serious rehabilitative efforts to minimize the risk of recidivism 2) helped achieve better sentencing uniformity and 3) attempted to curb society's misconceptions and misperceptions as to the actual amount of time served within the penal system.

Virginia attempted to adopt this mode of thought with the implementation of §53.1-165.1 C.O.V. and §§53.1-202.2-202.4 C.O.V. Yet, twenty four (24) years later, two thirds of the Truth-In-Sentencing package has yet to see fruition and the disparities are much more evident.

In Simmons v. South Carolina, 114 S.Ct. 2187, 512 U.S. 154, 129 L.Ed.2d 133 (1994)(see also: Ramdass v. Angelone, 187 F.3d 396 (1999)), the Supreme Court pondered the constitutionality of a jury's lack of information regarding life imprisonment and a sentence of death. In

its ponderance, the Supreme Court explored the general public's view of the death penalty, a term of life as well as determinate sentencing and it relied upon sources prior to and post 1995.

How long a defendant will remain in jail is a critical factor for juries. One study, for example, indicates that 79% of Virginia residents consider the number of years a defendant might actually serve before being paroled to be an "important" consideration when choosing between life imprisonment and the death penalty. (**see:** the Meaning of "Life" for Virginia Jurors and its Effects on Reliability in Capital Sentencing, 75 Va.L.Rev. 1605, 1624 and no. 102 (1989) citing study at National Legal Research Group). Two-thirds of the respondents in another survey stated that they would be more likely to give a life sentence instead of death if they knew the defendant had to serve at least 25 years in prison before being eligible for parole. Indeed, parole ineligibility information is so important that 62.3% of potential Virginia jurors would actually disregard a judge's instruction not to consider parole eligibility when determining a defendant's sentence. (**see:** 75 Va.L.Rev. at 1264-1265 no. 103.)

At the same time, the development of parole ineligibility statutes resulted in confusion and misperception, such that "common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole." **Simmons**, 114 S.Ct. 2187, 512 U.S. at 177-178, 129 L.Ed.2d 133 (1994). One study of potential Virginia jurors asked "If a person sentenced to imprisonment for intentional murder during an armed robbery, how many years on average do you think that person would actually serve before being released on parole?" The most frequent

answer was 10 years.(**see**: 75 Va.L.Rev. at 1624 at no, 101) Another potential juror survey put the average response at just over eight years. (**see**: Paduano & Smith 18 Colum.Human Rights L.Rev. at 223 no. 34). More than 70% of potential jurors think a person sentenced to life in prison for murder can be released at some point in the future.(**see**: Hughes, 44 S.C.L.Rev. at 408; Finn, Washington Post, Virginia Juries vote for Life, Febuary 3, 1997 pp A1 at A6). "Only 4% of Americans believe that convicted murderers will spend the rest of their days in prison."(**see**: Finn, at Wash.Post pp A1, A6).

At **Simmons v South Carolina**, 512 U.S. 154, 129 L.Ed.2d. 133, the Court noted, "It can hardly be questioned that most juries lack accurate information about the precise meaning of "life imprisonment" as defined by the states. For much of the country's history, parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term of years) in practice was understood to be shorter than stated term. (**see**: Generals Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform, 81 Calif.L.Rev. 61 (1993)(describing the development of mandatory sentencing laws)). Justice Chandler of the South Carolina Supreme Court observed that it is impossible to ignore "the reality, known to the 'reasonable juror', that, historically, life-term defendant's have been eligible for parole." **State v. Smith**, SC 482, 489-490, 381 S.E 2d 724, 728 (1989)."

Pre- 1995, before the enactment of the Truth-In-Sentencing package, which included the abolishment of parole, as noted in various studies and polls, potential jurors were under the misconception that a very limited amount of time would be served of the actual sentence imposed.

In comparison to the sentences imposed post-1995, this belief is absolutely correct.

January 1, 1995 and afterwards, when the abolishment of parole went into effect, potential jurors polled in Virginia and elsewhere still believed that a very limited amount of time would be served and for a minimum of five years afterwards until June of 2000 with the Supreme Court of Virginia ruling in **Fishback v. Commonwealth**, 260 Va. 104, 532 S.E.2d 629 (2000), the very same potential jurors in Virginia believed parole was still available to defendants and sentenced those defendants accordingly to the misconceptions that 1) a short amount of time would be served, an average of 1/3rd to 2/3rds of their original sentence and 2) parole was still available. The Supreme Court of Virginia recognized this egregious error and overruled the predecessor to **Fishback**, **Coward v. Commonwealth**, 164 Va. 639, 646 (1935), and ruled that from that date forward juries had to be notified that parole had been abolished.

The Truth-In-Sentencing reform package, as noted earlier, attempted to close the gap between the prisoner's original sentence and the time they actually served. This was completed successfully, though potential jurors were unaware of this and sentenced defendants to the same time they would have if the Truth-In-Sentencing reform package had not been enacted.

The failure lies where two-thirds of the Truth-In-Sentencing package still has yet to be enacted properly, even twenty-four years later. Though sentencing guidelines have always existed for crimes, 1) they are just that, guidelines that can help to determine an appropriate sentence but need not be followed and 2) they were never restructured to reflect the abolishment of parole and the inability to earn more than 4.5 days

of sentence credit for every 30 days served. Though the juries have never been notified of 'good time awards' and 'sentence credits' they understood that good behavior caused defendants to be released earlier than the original sentence, though they may not have understood the logistics of it. The guidelines that were implemented for crimes before January 1, 1995, took into account parole eligibility and in most cases the ability to earn a maximum of 30 days of good time credit for every 30 days served, though the Virginia legislature expressly limited those earnings to a maximum of 10 days for every 30 days served for various crimes and sentences. To this day, 24 years later, those very same guidelines that were used prior to 1995 are being used for those convicted of felony offenses on or after January 1, 1995.

This cannot be made more evident than in the sentencing of offenders to life and life plus sentences. The Virginia legislature took to heart the intent of the Truth-In-Sentencing reform package and framed, in mandatory language, §53.1-202.2 C.O.V. This statute, which governs the earned sentence credit earning for "**Every person** who is convicted of a felony offense committed on or after January 1, 1995" and specifically stipulates that **"Every person" "shall be eligible to earn sentence credits"** and that once those credits are earned they "**SHALL equal a deduction...from a person's term of incarceration.**" §53.1-202.2 even defines "sentence credit" and "earned sentence credit" to "mean deductions from a person's term of confinement earned through rules prescribed...through program participation and by meeting other such requirements..."

The Virginia legislature made available, sentence credits, to **"Every person...convicted of a felony offense committed on or after January 1,**

1995.." There was no stipulation on the length of sentence or the crime(s) committed. "**Every person** who is convicted of a felony offense committed on or after January 1, 1995...**shall be eligible** to earn sentence credits..." Under 18 U.S.C.S. §3551 S.R.A., determinate sentences and their guidelines were created for all offenses and offenders. Virginia modeled their Truth-In-Sentencing reform package after the federal S.R.A. and the legislature chose with care its words, when establishing §53.1-202.2 C.O.V. The intent is evidenced with its use of mandatory and unambiguous language, "**every person**" and "**shall**". With a sentencing commission and proper uniform sentencing guidelines, which was touted as part of the Truth-In-Sentencing reform package, determinate sentences were to be implemented for any and all offenders. Again, "**Every person who is convicted of a felony offense committed on or after January 1, 1995...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. This has been mandated by the legislature, to the executive branch in explicitly mandatory and unambiguous language. Once the credit is earned, it **SHALL** be applied. The executive branch is not free to depart from this.

If the legislative intent had been anything else, it would have expressly and specifically stipulated so, much as it did in §53.1-199 C.O.V. the predecessor to §53.1-202.2 C.O.V. §53.1-199 C.O.V. deals with the pre-1995 good conduct allowance system and is framed in part in discretionary language. The explicit legislative intent prior to 1995 was "Every person who, on or after July 1,1981, has been convicted of a felony...may be entitled to good conduct allowance..." It further set restrictions and made specific stipulations as to how much good conduct allowance may be earned for specific crimes and specific sentences. "Any person who, on or after

July 1, 1981...who has been sentenced to a term of life imprisonment or two or more life sentences...**SHALL** be eligible for no more than ten good conduct credits for every thirty days served..." The Virginia legislature limited the amount of credit earned and by whom and expressly mandated it in the language of §53.1-199 C.O.V.

In §53.1-202.2 C.O.V., the Virginia legislature, expressly mandated, with its use of explicitly mandatory and unambiguous terms that "**Every person** who is convicted of a felony offense committed on or after January 1, 1995...**shall be eligible** to earn sentence credits" and that once those credits are earned they "**SHALL** equal a deduction...from a person's term of incarceration."

If a person committed a felony offense on October 15, 2010, that person would be eligible to earn sentence credits under §53.1-202.2 C.O.V for that person is one of "every person" and if that person earned any sentence credits then they "**SHALL** equal a deduction...from a person's term of incarceration" pursuant to that very same statute. If a person committed a felony offense on March 6, 1995, he/she too is subject to that very same statute. "**Every person** who is convicted of a felony offense committed on or after January 1, 1995" are subject to this statute. The legislature expressly and purposefully encompassed "Every person...convicted of a felony offense...on or after January 1, 1995." There were no stipulations on certain crimes or length of sentence. The statute does not read 'Every person convicted of a felony offense but not sentenced to a term of life, shall be eligible...' The statute does not read 'Any person sentenced to a term of life shall not...' If that had been the intent of the legislature, it would have explicitly mandated it as it did in §53.1-199 C.O.V. The legislature would have also made specific stipulations as to who and who may

not earn credits based upon certain crimes and/or length of confinement as numerous other states have.

Ind.Code §11-13-3-2(b)(3)("A person sentenced to life imprisonment does not earn credit with respect to that term"); **Okla.Stat.Tit. 57, §138(A)**("No deductions shall be credited to any inmate serving a sentence of life imprisonment"); **La.Rev.Stat §15:529.1(A)**(Person sentenced to a habitual offender cannot receive diminuation of his sentence through good time credit); **Tenn.Code Ann. §§ 39-13-204 (a), (f)(1); 40-35-501 (h)(1)**(person sentenced to parolable life in prison must serve 60 years of his sentence before he is eligible for release on parole); **730 ILCS 5/3-6-3 (a)(2),(2.1)**(defendant convicted of first degree murder is ineligible for good time credit, whereas a defendant convicted of second degree murder receives one day of credit for every day served); **Ariz.RevStat.Ann. §13-703(A)(2001)**("If court does not sentence defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calander years" but a defendant sentenced to "natural life" will "not be released on any basis for the remainder of the defendant's natural life.");**W.Va. Code §28-5-27 (c)(d)**(Good time credits allow a prisoner the opportunity to cut his total sentence in half, but are not applicable to a life sentence); **Oregon Revised Statutes §421.120**(good time credits are not allowed to inmates serving life sentences.)

Even though S.R.A. of 1984 abolished parole for federal offenses committed after November 1, 1984 and the establishment of sentencing guidelines for all offenses was created, life sentences were still given out. After all, guidelines are guidelines and certain crimes are so heinous that a sentence of life is justified. The Senate took this all into account and stated in **18 U.S.C.S. §3624(b)**("Prisoners serving life sentences are

not entitled to a deduction for good time credits.")

Virginia's model was the Sentencing Reform Act of 1984, which abolished parole, established a range of determinate sentences for all offenses and offenders, created a sentencing commission and with the use of specific language, stipulated that prisoners serving life sentences are not entitled to a deduction for good time credits.

Touting reform to garner votes and support, the General Assembly of Virginia and Governor George Allen passed the reform package but in its haste implemented the centerpiece of the package, the elimination of parole for all offenders who committed felonies on or after January 1, 1995, without first establishing a sentencing commission and uniform sentencing guidelines that reflected the "new law". To this day, the disparities of sentencing between similarly situated offenders is overwhelming and very little has been done to correct the issues.

The Supreme Court of Virginia, half-heartedly tried to correct a glaring oversight by establishing in **Fishback v. Commonwealth**, that from that date in June of 2000 on, the juries had to be notified as to the abolition of parole. Juries up until that point were under the misconception that parole was still available and were sentencing defendants as if they were eligible for parole and a reduced sentence. Yet the Supreme Court of Virginia refused to make that ruling retroactive to apply to **"Every person"** sentenced on or after January 1, 1995 up until the **Fishback** decision in June of 2000. This would have meant resentencing a little over 300+ inmates within a reasonable timeframe in which evidence would not have possibly been degraded, the impact of the events are still felt heavily, and the juries would not be nearly as disconnected from the events. Numerous House and Senate bills have been presented in Virginia to rectify

that situation alone. Bills have been presented to resentence non-violent offenders from 1995 until the **Fishback** decison. **see: SB216 (2016); SB825 (2017); SB100 (2018).** A bill was presented in 2017 **SB223** to resentence non capital felony offenders. Bills were presented to offer parole for offenders convicted of felony offenses on or after January 1, 1995 until the **Fishback** decision in 2000. **see: HB390 (2016); HB1314 (2018).** These were consistently presented because it is recognized by legislators and senators that most Virginians and Virginian juries lacked accurate information, were confused and under the misperception that any and every sentence still carried with it the possibility for parole and sentenced offenders according to these misperceptions. Study after study has shown the ignorance of most Virginians to the legal landscape and many offenders have suffered. This is not the public's fault. Their misperceptions are fed by a host of stimuli but one of the biggest purveyors of that misperception is the failure to implement the more uniform sentencing guidelines so similar crimes and similarly situated offenders are not sentenced to such disproportionate sentences based upon the political clime, region, class or race. Senators and Legislators have attempted to rectify some of the issues here and there but to little or no avail. This must be an issue addressed by the Supreme Court of the United States.

It is not for the Supreme Court to decide about parole. It is not for the Supreme Court to force Virginia to conform to uniform sentencing guidelines. It is not for the Supreme Court to make **Fishback** retroactive right now. It is for the Supreme Court to rule upon numerous constitutional and statutory violations committed by the V.D.O.C. (executive branch) by not applying the law as it is unambiguously mandated. It is for the Supreme Court to declare that the policies complained of, that have rewritten their

governing statute, must be stricken and declared **VOID** for they cannot have concurrent operation with their governing statute. It is for the Supreme Court to enforce with Virginia the ancient Justinian maxim **a verbis legis non est recedendum.** "Do not depart from the words of law."

SUMMARIZATION

This is being brought before this Court because the V.D.O.C.'s continued use of policies, unauthorized by the legislature, violate Johnson's statutory and constitutional rights. The issued raised within the Writ of Certiorari are based in law, protected by the United States Constitution and are undeniable as well as irrefutable. The Defendant, in performance of a ministerial duty, has acted arbitrarily and capriously. These actions are unlawful and cannot be excused simply because the D.O.C. and himself, the Director of the department, have erroneously interpreted the state law and have failed to comply with the provisions set forth in the Code of Virginia.

With the establishment and application of the prison policies that are in direct conflict with the mandatory language and intent of their clearly established governing state law, it has given rise to a host of constitutional violations. The creation of these policies, that are so deficient and clearly contrary to the legislative intent, have implemented the means by which the defendant has eviscerated any and all rights granted to Johnson by the state law and have denied Johnson any process due to prevent that from happening. In order to lose any credits earned, someone must have violated the rules and regulations and received an internal hearing of some sort to establish guilt and then as a sanction for being found guilty for certain offenses, credits are

then lost. This is the process due to "every person" within the Virginia Department of Corrections and this is the process due established in **Wolff** and continuoulsy upheld decades later.

The V.D.O.C. has circumvented any and all process required with the implementation of policies that are in direct conflict with the mandatory language and intent of their governing statute §53.1-202.2 C.O.V. By doing so, they have removed Johnson from his clearly established rights and left him no recourse in obtaining what is mandated to him by law. Johnson has consistently been assigned to an ESC earning level III in which "every person...shall" earn 1.5 days of credit for every 30 days served. Even the defendant and his underlings have conceeded to that fact.

Johnson is confident that this Honorable Court will recognize the claims set forth in this Writ of Certiorari, grant him the Declaratory Judgment he has sought and grant any other relief this Court deems appropriate. According to the laws of the Commonwealth of Virginia and the United States Constitution, Johnson has a protected liberty interest that is to be equally protected and cannot be denied without due process of the law. The defendant, along with the agents of the V.D.O.C., with the execution of unconstitutional policies, have ignored a valid state statute, thus far, with impunity. He has failed, continue to fail and will continue to fail to meet those obligations which are mandated to him by state law, simply because this is the usual practice. By the continuing of such actions, the defendant and his agents have imposed a significant and atypical hardship as well as significant constitutional harm; unlawfully, unequally and without due process of the law.

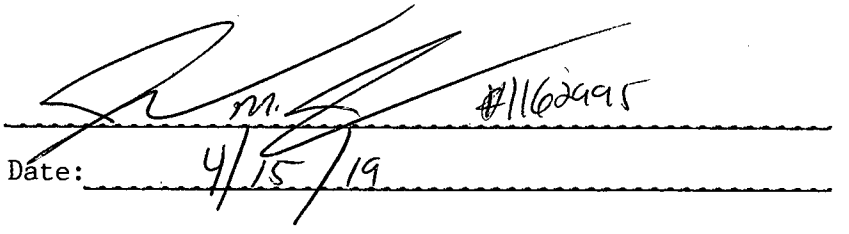
Johnson is also confident that the Court will recognize that the contours of his rights are sufficiently clear. So clear that any resonable official would understand that his or her actions violates those rights. The defendant

and his agents have exercised power possessed by the virtue of state law to change the clear meaning of the statutorily mandated terms "**every person**" found in §53.1-202.2 C.O.V. to 'some people' and "**shall**" also found in §53.1-202.2 C.O.V. to "shall not" found in OP 830.3 V H 5(b). These violations are glaringly and painfully obvious with egrigous results. This course of conduct provides no shield of immunity and shows that Johnson's clearly established rights are consistently being ignored and violated. The defendant has not been granted any authority by the Virginia legislature to rewrite the valid state law and change its mandatory intent. The legislature chose with care its words or it would have written the state law differently. This is evidenced by numerous other states that have specifially stipulated who and who may not earn sentence credits as well as stipulating specific crimes for which would make a person ineligible to earn sentence credits. This was also done by the Virginia legislature prior to the abolishment of parole with §53.1-199 C.O.V. where for certain crimes as well as sentences, a person sentenced to a term of confinement was only able to earn a certain amount of sentence credits. The defendant has usurped the mandatory legislative intent with the implementation of these constitutionally and statutorily deficient policies and Johnson feels confident that this Honorable Court will find judgment in his favor.

CONCLUSION

The petiton for a **Writ of Certiorari** should be granted.

Respectfully submitted,



Date: 4/15/19