

Virginia Criminal Sentencing Commission

June 10, 2024

Title:

Legal Developments: Earned Sentence Credits

Overview: This session will provide an overview of Code of Virginia 53.1-202.3 as enacted on January 1, 1995, the changes effective on July 1, 2022, impact of recent Virginia Supreme Court decisions, and the expiration of the 2022 Biennial Budget which included Budget Item 404 (R)(2).

Content Outline:

1. Review of 53.1-202.3 as originally enacted, to include the portion of sentence served and calculations prior to July 1, 2022.
2. The July 1, 2022 implementation of changes to Virginia Code § 53.1-202.3 as outlined in SB5034 approved on November 9, 2020, by the Virginia General Assembly 2020 Special Session I, in combination with the 2022 Biennial Budget, Budget Item 404 (R)(2).
3. Overview and impact of the Virginia Supreme Court ruling in Prease v Clarke (2023) related to:
 - a. Code § 53.1-202.3 (A)(1).
 - b. Code § 53.1-202.3 (A)(9).
4. Overview and impact of the Virginia Supreme Court ruling in Vasquez v Dotson (2024).
5. Impact of the expiration of the 2022 Biennial Budget which included Budget Item 404 (R)(2).
6. Calculating earned sentence credits on and after July 1, 2024.
 - a. VDOC Operating Procedure 830.3 and credits applied towards earned sentence credit sentences prior to entry of final order and after a person is determined to be state responsible.
 - b. Discussion concerning the importance of the sentencing court specifying the case / offense on which active time is to be served.
 - c. Ordering concurrency between sentences, to include
 - i. Different jurisdictions.
 - ii. Application of earned sentence credits on sentences in a concurrent relationship.

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Code of Virginia

Title 53.1. Prisons and Other Methods of Correction

Chapter 6. Commencement of Terms; Credits and Allowances

Article 4. Earned Sentence Credits for Persons Committed Upon Felony Offenses Committed on or After January 1, 1995

§ 53.1-202.3. Rate at which sentence credits may be earned; prerequisites

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

1. A Class 1 felony;
2. Solicitation to commit murder under § 18.2-29 or any violation of § 18.2-32, 18.2-32.1, 18.2-32.2, or 18.2-33;
3. Any violation of § 18.2-40 or 18.2-45;
4. Any violation of subsection A of § 18.2-46.5, of subsection D of § 18.2-46.5 if the death of any person results from providing any material support, or of subsection A of § 18.2-46.6;
5. Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2;
6. Any malicious felonious assault or malicious bodily wounding under Article 4 (§ 18.2-51 et seq.) of Chapter 4 of Title 18.2, any violation of § 18.2-51.6 or 18.2-51.7, or any felony violation of § 18.2-57.2;
7. Any felony violation of § 18.2-60.3;
8. Any felony violation of § 16.1-253.2 or 18.2-60.4;
9. Robbery under § 18.2-58 or carjacking under § 18.2-58.1;
10. Criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;
11. Any violation of § 18.2-90;
12. Any violation of § 18.2-289 or subsection A of § 18.2-300;
13. Any felony offense in Article 3 (§ 18.2-346 et seq.) of Chapter 8 of Title 18.2;
14. Any felony offense in Article 4 (§ 18.2-362 et seq.) of Chapter 8 of Title 18.2, except for a violation of § 18.2-362 or subsection B of § 18.2-371.1;
15. Any felony offense in Article 5 (§ 18.2-372 et seq.) of Chapter 8 of Title 18.2, except for a violation of subsection A of § 18.2-374.1:1;
16. Any violation of subsection F of § 3.2-6570, any felony violation of § 18.2-128, or any violation of § 18.2-481, 37.2-917, 37.2-918, 40.1-100.2, or 40.1-103; or
17. A second or subsequent violation of the following offenses, in any combination, when such

offenses were not part of a common act, transaction, or scheme and such person has been at liberty as defined in § 53.1-151 between each conviction:

- a. Any felony violation of § 3.2-6571;
- b. Voluntary manslaughter under Article 1 (§ 18.2-30 et seq.) of Chapter 4 of Title 18.2;
- c. Any violation of § 18.2-41 or felony violation of § 18.2-42.1;
- d. Any violation of subsection B, C, or D of § 18.2-46.5 or § 18.2-46.7;
- e. Any violation of § 18.2-51 when done unlawfully but not maliciously, § 18.2-51.1 when done unlawfully but not maliciously, or § 18.2-54.1 or 18.2-54.2;
- f. Arson in violation of § 18.2-77 when the structure burned was occupied or a Class 3 felony violation of § 18.2-79;
- g. Any violation of § 18.2-89 or 18.2-92;
- h. Any violation of subsection A of § 18.2-374.1:1;
- i. Any violation of § 18.2-423, 18.2-423.01, 18.2-423.1, 18.2-423.2, or 18.2-433.2;or
- j. Any violation of subdivision E 2 of § 40.1-29.

The earning of sentence credits shall be conditioned, in part, upon full participation in and cooperation with programs to which a person is assigned pursuant to § 53.1-32.1.

B. For any offense other than those enumerated in subsection A for which sentence credits may be earned, earned sentence credits shall be awarded and calculated using the following four-level classification system:

1. Level I. For persons receiving Level I sentence credits, 15 days shall be deducted from the person's sentence for every 30 days served. Level I sentence credits shall be awarded to persons who participate in and cooperate with all programs to which the person is assigned pursuant to § 53.1-32.1 and who have no more than one minor correctional infraction and no serious correctional infractions as established by the Department's policies or procedures.
2. Level II. For persons receiving Level II sentence credits, 7.5 days shall be deducted from the person's sentence for every 30 days served. Level II sentence credits shall be awarded to persons who participate in and cooperate with all programs, job assignments, and educational curriculums to which the person is assigned pursuant to § 53.1-32.1, but who require improvement in not more than one area as established by the Department's policies or procedures.
3. Level III. For persons receiving Level III sentence credits, 3.5 days shall be deducted from the person's sentence for every 30 days served. Level III sentence credits shall be awarded to persons who participate in and cooperate with all programs, job assignments, and educational curriculums to which the person is assigned pursuant to § 53.1-32.1, but who require significant improvement in two or more areas as established by the Department's policies or procedures.
4. Level IV. No sentence credits shall be awarded to persons classified in Level IV. A person will be classified in Level IV if that person willfully fails to participate in or cooperate with all programs, job assignments, and educational curriculums to which the person is assigned

pursuant to § 53.1-32.1 or that person causes substantial security or operational problems at the correctional facility as established by the Department's policies or procedures.

C. A person's classification level under subsection B shall be reviewed at least once annually, and the classification level may be adjusted based upon that person's participation in and cooperation with programs, job assignments, and educational curriculums assigned pursuant to § 53.1-32.1. A person's classification and calculation of earned sentence credits shall not be lowered or withheld due to a lack of programming, educational, or employment opportunities at the correctional facility at which the person is confined. Records from this review, including an explanation of the reasons why a person's classification level was or was not adjusted, shall be maintained in the person's correctional file.

D. A person's classification level under subsection B may be immediately reviewed and adjusted following removal from a program, job assignment, or educational curriculum that was assigned pursuant to § 53.1-32.1 for disciplinary or noncompliance reasons.

E. A person may appeal a reclassification determination under subsection C or D in the manner set forth in the grievance procedure established by the Director pursuant to his powers and duties as set forth in § 53.1-10.

F. For a juvenile sentenced to serve a portion of his sentence as a serious juvenile offender under § 16.1-285.1, consideration for earning sentence credits shall be conditioned, in part, upon full participation in and cooperation with programs afforded to the juvenile during that portion of the sentence. The Department of Juvenile Justice shall provide a report that describes the juvenile's adherence to the facility's rules and the juvenile's progress toward treatment goals and objectives while sentenced as a serious juvenile offender under § 16.1-285.1.

G. Notwithstanding any other provision of law, no portion of any sentence credits earned shall be applied to reduce the period of time a person must serve before becoming eligible for parole upon any sentence.

1994, 2nd Sp. Sess., cc. 1, 2;2008, c. 517;2020, Sp. Sess. I, cc. 50, 52;2021, Sp. Sess. I, c. 389.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

PRESENT: All the Justices

JOSE ISAIS GARCIA VASQUEZ

v. Record No. 230514

CHADWICK DOTSON, DIRECTOR OF
THE VIRGINIA DEPARTMENT OF
CORRECTIONS, ET AL.

OPINION BY
JUSTICE D. ARTHUR KELSEY
APRIL 18, 2024

Upon Petition for Writ of Habeas Corpus

Jose Isais Garcia Vasquez seeks a writ of habeas corpus, asserting that he has a right under Code § 53.1-202.3 to an early release from prison. One of his two convictions involved conspiracy to commit first-degree murder. The Director of the Virginia Department of Corrections and the Warden of the Haynesville Correctional Center (collectively, the “Commonwealth”) contend that the General Assembly did not intend such a “serious and dangerous” offense to be eligible under the early-release statutes. *See* Resp’t Mot. to Dismiss Pet. at 1 [hereinafter Mot. to Dismiss]. In response, Vasquez argues that the literal text of Code § 53.1-202.3, when contextually construed using neutral principles of statutory interpretation, demonstrates that the early-release statute applies to his conspiracy conviction. We agree and will issue the writ.

I.

Initially indicted by a grand jury for first-degree murder in violation of Code § 18.2-32, Vasquez pleaded guilty in 2019 to an amended charge of conspiracy to commit a felony in violation of Code § 18.2-22 — with the predicate felony being first-degree murder. Vasquez also pleaded guilty to violating Code § 18.2-46.2(A), a statute prohibiting a member or active participant in a “criminal street gang” from committing a “criminal act . . . for the benefit of, at the direction of, or in association with any criminal street gang.”

The trial court sentenced Vasquez on each conviction to 10 years imprisonment with 5 years suspended for a total of 10 years of active incarceration. Vasquez entered the penitentiary in July 2020. At that time, he was eligible under then-existing Code §§ 53.1-202.2 and 53.1-202.3 to receive earned-sentence credits at a maximum rate of 4.5 days of credit for every 30 days served. Under the then-existing statutory framework, all convicted felons would serve at least 85% of their sentences. *See* Comm’n on Sent’g & Parole Reform, *Sentencing and Parole Reform*, House Doc. No. 18, at 19 (1995); Va. State Crime Comm’n, *2020 Annual Report*, at 16, 21 (June 30, 2021).

In 2020, the General Assembly amended the earned-sentence credit program with an effective date of July 1, 2022. *See Prease v. Clarke*, 302 Va. 376, 379-80 (2023). Under the new early-release program, prisoners with qualifying convictions are eligible to receive credits at a higher rate of up to 15 days of credit for every 30 days served. *See* Code § 53.1-202.3(B). According to the Virginia Criminal Sentencing Commission, the new crediting system could potentially lower the actual incarceration of some but not all convicted felons to 67% of the court-ordered sentences. *See* Va. Crim. Sent’g Comm’n, *Re-analysis of Virginia’s Sentencing Guidelines and Midpoint Enhancements for Violent Offenders (Chapter 783, 2022)*, House Doc. No. 13, at 1 n.3, 5, 49 n.22 (2022).

Subsection A of the amended statute enumerates various disqualifying convictions that do not receive the new, more favorable, sentencing credits. One of them is “any violation of § 18.2-32.” *See* Code § 53.1-202.3(A)(2). Code § 18.2-32 distinguishes between first- and second-degree murder, deeming first-degree murder a Class 2 felony for sentencing purposes and fixing punishment for second-degree murder at 5 to 40 years in the penitentiary. Subsection A of amended Code § 53.1-202.3, however, does not include a violation of Code § 18.2-22 as a

disqualifying conviction. In relevant part, Code § 18.2-22(a) applies to those who “shall conspire, confederate or combine with another . . . to commit a felony.”

Because he was not convicted of either first- or second-degree murder, Vasquez argues that he did not violate Code § 18.2-32 and thus was not disqualified from early release under the enhanced earned-sentence credit statute. While acknowledging that conspiracy to commit a felony in violation of Code § 18.2-22 is not literally “enumerated in subsection A,” *see* Code § 53.1-202.3(B), the Commonwealth argues that conspiracy to commit a murder is subsumed within the phrase “any violation of § 18.2-32,” *see* Code § 53.1-202.3(A)(2), and thus is a disqualifying conviction. *See generally* 2022 Op. Atty. Gen. 22-008, 2022 Va. AG LEXIS 11 (April 13, 2022). The dispute is not merely academic in this case. If Vasquez is correct, he is entitled to immediate release.¹ If the Commonwealth is correct, Vasquez’s earliest release date would be in February 2025.

II.

Under Virginia law, “[c]riminal punishment serves a number of purposes, including incapacitation, deterrence, and retribution.” *Walker v. Commonwealth*, 302 Va. 304, 324 (2023); *see also Woodard v. Commonwealth*, 287 Va. 276, 281 (2014); *Wilborn v. Saunders*, 170 Va. 153, 160 (1938). With these purposes in mind, Virginia’s sentencing guidelines seek “to ensure the imposition of appropriate and just criminal penalties . . . especially for the effective incapacitation of violent criminal offenders.” Code § 17.1-801.² In support of these goals, the

¹ Vasquez has remained classified at Level 1 at all times during his incarceration, which would earn him the maximum of 15 credits for every 30 days served under Code § 53.1-202.3 (B)(1). The Commonwealth does not dispute that if Vasquez’s earned-sentence credits were calculated under his interpretation of Code § 53.1-202.3, he would be eligible for immediate release. Mot. to Dismiss at 8 n.1.

² “An important function of the corrections system,” the United States Supreme Court has observed, “is the deterrence of crime.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

General Assembly has provided various “tools for rehabilitation of criminals,” *Peyton v. Commonwealth*, 268 Va. 503, 508 (2004), premised on the belief that rehabilitation that is truly effective reduces recidivism.

Legislating within this penological context, the General Assembly in 2020 increased the availability of earned-sentence credits “as an incentive for good behavior and rehabilitative activity while incarcerated.” *Prease*, 302 Va. at 379. Accepting this as the declared purpose of the legislation, the parties ask us to choose between their disparate views on whether the legislature intended enhanced credits to apply to criminals convicted of conspiring to commit murder. In addressing this question, however, we ask “not what the legislature intended to enact, but what is the meaning of that which it did enact. We must determine the legislative intent by what the statute says and not by what we think it should have said.” *Carter v. Nelms*, 204 Va. 338, 346 (1963). We thus do not inquire as to “what the legislature meant; we ask only what the statute means.” *Tvardek v. Powhatan Vill. Homeowners Ass’n*, 291 Va. 269, 277 n.7 (2016) (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899)).

As we said nearly a century ago, “[i]t is our duty to interpret the statute as written and when this is done our responsibility ceases.” *City of Lynchburg v. Suttentfield*, 177 Va. 212, 221 (1941). We see things no differently today. “[T]he interpretative principle that precedes all

The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses. This isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender’s demonstrated criminal proclivity.

Id. at 822-23.

others is that ‘courts must presume that a legislature says in a statute what it means and means in a statute what it says there.’” *Appalachian Power Co. v. State Corp. Comm’n*, 301 Va. 257, 279 (2022) (citation omitted). Given our commitment to “neutral principles of interpretation,” we are not “free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal.” *Id.* (citation omitted).

This perspective leads us to a simple exposition of the disputed text in Code § 53.1-202.3(A)(2) — “any violation of § 18.2-32” — as a conviction disqualified from receiving the enhanced sentencing credits. “Any” is an adjective modifying “violation,” which is further modified by the prepositional phrase “of § 18.2-32.” The question is whether “any violation of § 18.2-32” includes the inchoate offense of conspiracy to commit murder. The answer must be no. An accused criminal indicted for murder under Code § 18.2-32 cannot be convicted on that indictment for conspiracy to commit murder under Code § 18.2-22. Nor can an accused criminal indicted for conspiracy be convicted of murder. They are separate crimes with separate elements. Neither is a lesser-included offense of the other. The jury instructions are different, the trial court’s review of the sufficiency of the evidence is different, and the statutory punishments are different.

Challenging this interpretation as literalistic, the Commonwealth relies on the maxim that “a statute should never be construed in a way that leads to absurd results.” Mot. to Dismiss at 10 (quoting *Ricks v. Commonwealth*, 290 Va. 470, 477 (2015)). The alleged absurdity appears to be twofold: (i) the anomaly of denying early release to those that solicit others to commit murder (a crime expressly deemed disqualifying by Code § 53.1-202.3(A)(2)) but granting it to those who conspire with others to commit murder³ and (ii) the related oddity of granting early release to

³ “To read the term ‘any violation of’ in this subdivision as referring to only the completed crime,” the Attorney General has opined, “would lead to the irrational conclusion that

conspirators who agree to commit a premeditated murder and yet denying it to murderers that act with malicious, but not premeditated, intent. The “any violation” language remedies these aberrations, the Commonwealth argues, by treating conspiracy to commit murder as a “type” of murder prohibited by Code § 18.2-32. Mot. to Dismiss at 11, 16.

This argument asks too much of Code § 18.2-32. Neither this statute, nor any other, defines murder or lays out the essential elements of the crime. *See generally Wooden v. Commonwealth*, 222 Va. 758, 761 (1981) (observing that “murder is not elsewhere defined in the Code”). Murder is a term of art with an “ancient common law” definition. *Heacock v. Commonwealth*, 228 Va. 397, 403 (1984).⁴ Professor Costello concisely summarized it as “the unlawful killing of one human being by another with malice aforethought.” John L. Costello, *Virginia Criminal Law and Procedure* § 3.2[1], at 41 (4th ed. 2008).

The term “murder” has been incorporated into scores of Virginia statutes. Code § 18.2-32 is one of them. It first mentions, but then excludes from its reach, “aggravated murder” that is governed by Code § 18.2-31. Code § 18.2-32 thereafter categorizes three types of first-degree murder based upon the circumstances of the killing. These include murders (i) “by poison, lying in wait, imprisonment, [or] starving”; (ii) “by any willful, deliberate, and premeditated killing”; or (iii) “in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-

the General Assembly intended to make solicitation to commit murder ineligible for enhanced sentence credits — yet leave convictions for conspiracies or actual attempts to commit murder eligible for enhanced sentence credits.” 2022 Op. Atty. Gen. 22-008, 2022 Va. AG LEXIS 11, at *4-5 (emphasis omitted).

⁴ *See generally M’Whirt’s Case*, 44 Va. (3 Gratt.) 594, 604 (1846); *Whiteford v. Commonwealth*, 27 Va. (6 Rand.) 721, 723 (1828); 4 William Blackstone, *Commentaries* *195; 2 Edward Coke, *The First Part of the Institutes of the Laws of England: or, a Commentary upon Littleton* § 500, at 287b (1st Am. ed. 1853); James M. Matthews, *Digest of the Laws of Virginia of a Criminal Nature* 154-55 n.1 (2d ed. 1878); George Webb, *The Office and Authority of a Justice of the Peace* 231 (1736).

31.” Code § 18.2-32. All types of murder other than those described in Code §§ 18.2-31 and 18.2-32 are deemed “murder of the second degree.” Code § 18.2-32. Though they are fairly described as discrete types of murder, that does not change the settled view that these “statutory gradations” did not create “new offenses.” *Flanders v. Commonwealth*, 298 Va. 345, 354 (2020). “Instead, they established punishments for the common law crime of murder that correspond to the degree of culpability with which it is committed.” *Id.*; *see also Wicks v. Commonwealth*, 4 Va. (2 Va. Cas.) 387, 392 (1824).

No statute treats conspiracy to commit murder as a *type* of murder. Nor is there any common-law tradition of doing so. It would be difficult, to be sure, to conceive how it could be. The definition of murder (and, it follows, all types of murder) requires the “fact of a death.” *Costello, supra*, § 3.2[3], at 42. That fact “may be established directly or circumstantially, but it must be established.” *Id.* One cannot murder a victim by merely thinking about murdering him, plotting to murder him, or entering into a conspiratorial agreement with others to murder him. A conspiracy to commit a murder requires only an agreement to commit a future murder that may or may not ever occur. But if a conspirator later follows through on the agreement and maliciously kills the targeted victim, the conspirator has committed two crimes: murder and conspiracy to commit murder. *See id.* § 17.4, at 272-73. He can be indicted for and convicted of both crimes. *See Boyd v. Commonwealth*, 236 Va. 346, 351 (1988) (distinguishing simultaneous charges from subsequent charges barred by Code § 18.2-23.1).

This reasoning syncs well with the traditional view that the “distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law.” *Callanan v. United States*, 364 U.S. 587, 593 (1961). In many contexts and over many years, courts have recognized that “the commission of the substantive offense and a conspiracy to commit it are separate and

distinct offenses.” *Id.* (quoting *Pinkerton v. United States*, 328 U.S. 640, 643 (1956)). We see no reason in this case to blur this distinction by judicially defining the separate and distinct offense of conspiracy to commit murder as a type of the substantive offense of murder.

In this case, the grand jury indicted Vasquez for murder in violation of Code § 18.2-32. The trial court, however, accepted a motion to amend the indictment to allege only conspiracy to commit murder in violation of Code § 18.2-22. Vasquez pleaded guilty to the amended-conspiracy indictment and was never convicted of murder in violation of Code § 18.2-32. Because the General Assembly chose not to disqualify conspiracy to commit murder from Code § 53.1-202.3’s calculation of enhanced earned-sentence credits, Vasquez is entitled to these credits and thus to early release from prison.

As in *Prease*, we offer no commentary on the policy judgments baked into this statute as a whole or the disputed provision in particular. It is not our place to do so. We unanimously held in *Prease* that the statutory text provided enhanced earned-sentence credits to criminals convicted of attempted aggravated murder yet denied such credits to criminals found guilty of solicitation of murder. Because our textual and contextual analysis required that result, we said that competing “policy implications . . . do not factor into our interpretation” of the statute. *Prease*, 302 Va. at 385. We explained in *Prease* the importance of this jurisprudential limitation.

It bears repeating here:

The legislature is “the author of public policy.” For us, then, “the ‘best indications of public policy are to be found in the enactments of the Legislature.’” “We can only administer the law as it is written.” We may not extend the meaning of a statute “simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.”

Id. at 385-86 (citations omitted) (quoting *In re: Woodley*, 290 Va. 482, 490 (2015)).

III.

In sum, we grant Vasquez's petition and issue a writ of habeas corpus directed to the Director of the Virginia Department of Corrections and to the Warden of the Haynesville Correctional Center ordering that Vasquez be released from custody.

Writ Awarded.