

**REPORT OF THE VIRGINIA
DEPARTMENT OF CORRECTIONS**

**Earned Sentence Credit
Legislation – House Bill 5148
Report (Chapter 50, 2020 SSI)**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 7

**COMMONWEALTH OF VIRGINIA
RICHMOND
2023**

**Earned Sentence Credit Legislation
House Bill 5148- Report**



Harold W. Clarke, Director

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Authority

House Bill 5148 directed Virginia Department of Corrections (VADOC) to “convene a work group to study the impact of the sentence credit amendments set forth in this act,” and “report its finding and conclusions to the Governor and the General Assembly by June 1, 2023.” “The report shall include (i) the state fiscal impact of the sentence credit amendments, including any cost savings realized by reducing the length of time spent by persons in state correctional facilities; (ii) the number of persons affected by the sentence credit amendments and the distribution of such persons among state correctional facilities; (iii) a detailed six-year plan describing the estimated releases by facility under this act, accounting for any persons who will be transferred from jail, as well as persons who would be otherwise released in the covered years; and (iv) any other information the Department deems relevant.”

Background

House Bill 5148, which was passed by the Virginia General Assembly during the 2020 Special Session I, amended Code § 53.1-202.3 as it relates to the amount and rate of sentence credit that may be earned. House Bill 5148, codified at Chapter 50 of the 2020 Special Session I Acts of Assembly, reads as follows:

Be it enacted by the General Assembly of Virginia:

1. That § 53.1-202.3 of the Code of Virginia is amended and reenacted as follows:

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

A. A maximum of ~~four and one-half~~ 4.5 sentence credits may be earned for each 30 days served *on a sentence for*:

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;*
 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.
1. 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.
2. 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.
3. 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.

2. That the Department of Corrections (the Department) shall convene a work group to study the impact of the sentence credit amendments set forth in this act. The work group shall include representatives of the Senate Committee on Finance and Appropriations, the House Committee on Appropriations, the Virginia State Crime Commission, and any other stakeholders the Department deems appropriate. The Division of Legislative Services shall provide staff support to the work group. The Department shall report to the Governor and the General Assembly by July 1, 2021, the membership of the work group and the work group's plan for conducting such study, including any data and information upon which the work group will rely in conducting such study, and shall report its finding and conclusions to the Governor and the General Assembly by June 1, 2023. The report shall include (i) the state fiscal impact of the sentence credit amendments, including any cost savings realized by reducing the length of time spent by persons in state correctional facilities; (ii) the number of persons affected by the sentence credit amendments and the distribution of such persons among state correctional facilities; (iii) a detailed six-year plan describing the estimated releases by facility under this act, accounting for any persons who will be transferred from jail, as well as persons who would be otherwise released in the covered years; and (iv) any other information the Department deems relevant.

3. That the provisions of this act, other than the provisions of the second enactment of this act, shall become effective on July 1, 2022.

4. That the provisions of § 53.1-202.3 of the Code of Virginia, as amended by this act, shall apply retroactively to the entire sentence of any person who is confined in a state correctional facility and participating in the earned sentence credit system on July 1, 2022. If it is determined that, upon retroactive application of the provisions of § 53.1-202.3 of the Code of Virginia, as amended by this act, the release date of any such person passed prior to the effective date of this act, the person shall be released upon approval of an appropriate release plan and within 60 days of such determination unless otherwise mandated by court order; however, no person shall



have a claim for wrongful incarceration pursuant to § 8.01-195.11 of the Code of Virginia on the basis of such retroactive application. If a person is released prior to completion of any reentry programs deemed necessary by the Department of Corrections on the person's most recent annual review or prior to completion of any programs mandated by court order, the person shall be required to complete such programs under probation, provided probation is mandated by the court and current community resources are sufficient to facilitate completion of the aforementioned programs.

5. That the Department of Corrections shall ensure that educational, vocational, counseling, and substance abuse programs for earning sentence credits are available at all state correctional facilities.

6. That the Department of Corrections shall ensure that educational, vocational, counseling, substance abuse, rehabilitative, and reentry services are available at all probation and parole offices.

7. That the Department of Criminal Justice Services shall continue to administer grant funding to private entities for the purpose of assisting in reentry services.

Before House Bill 5148 went into effect on July 1, 2022, the Virginia General Assembly approved the 2022 Biennial Budget on June 22, 2022. This included Budget Item 404(R)(2) which modified the scope of inmates eligible for the earned-sentence credit (ESC) structure that was set forth in House Bill 5148 and Senate Bill 5034 passed during the 2020 Special Session I. Budget Item 404(R)(2) states as follows:

“2. Notwithstanding the provisions of § 53.1-202.3, Code of Virginia, a maximum of 4.5 sentence credits may be earned for each 30 days served on a sentence that is concurrent with or consecutive to a sentence for a conviction of an offense enumerated in subsection A of § 53.1-202.3, Code of Virginia.”

This report is divided into four (4) sections. Each segment relating directly to the sections as outlined in the legislation.

Section I: Fiscal Impact

The legislation requires VADOC to report “the state fiscal impact of the sentence credit amendments, including any cost savings realized by reducing the length of time spent by persons in state correctional facilities”.

Findings

Due to the change in sentencing calculations from the implementation of HB 5148, VADOC had to retroactively recalculate inmate’s entire sentences. This required extensive changes to the Virginia Corrections Information System (VirginiaCORIS), used to track offender data including time served and sentence credits earned. VADOC originally estimated that these changes would cost around \$1 million to modify VACORIS and incorporate the new earned-sentence-credit tiers. VADOC projected these changes would require additional positions; ranging from information technology, court and legal services, offender management and community release services, inmate re-entry positions, and additional probation and parole officers for community services to fulfill the requirements set forth in legislation. VADOC estimated that these positions would approximately cost \$7.3 million each year. The budget bill provided significant appropriations to VADOC to implement HB5148 in both the 2020 Budget and the 2022 Budget.



HB 5148 was enacted on July 1, 2022; ten (10) months post implementation, the complete picture of the fiscal impact cannot be presented at this time. Additionally, in the event the Budget Item (404)(R)(2) contained in the 2022 Biennial Budget is excluded from future budgets, the earned sentence credit language would revert to the original bill (HB5148) as passed. Repeated changes in inmate sentence calculation requires reprogramming of VirginiaCORIS, jeopardizes the stability of the operating system, and increases the risk of erroneous releases or holding inmates in custody past the date their active sentence(s) would have been satisfied. It is unknown what additional costs (if any) would be incurred. With that understanding, VADOC will provide current fiscal impacts to date: budget allocations, VirginiaCORIS modifications, and pending legal impacts.

Budget Allocations

Within the fiscal impact statement from the original bill presented in 2020, VADOC anticipated some costs to potentially offset depending on the number of inmates released. This fiscal impact statement was created before Budget Item (404)(R)(2) was passed. Incorporating the changes contained in Budget Item (404)(R)(2) drastically reduced the anticipated number of inmates being released and the number of inmates whose release dates required recalculation. Consequently, any potential costs savings from the release of inmates is lower than originally anticipated and does not appear to offset other costs related to the sentence credit amendments- *i.e.* costs of funding new positions in the Court and Legal Services and probation and parole offices, providing re-entry programming after release, modifications to VirginiaCORIS, and legal costs specifically associated with litigation related to Budget Item (404)(R)(2).

The Department received initial funding for the implementation of the legislation during the 2020 Special Session of \$1,304,753 in FY21 with 12 APL and \$4,486,555 in FY22 with 74 APL for a total of 86 APL. During the 2022 Special Session the Department received appropriation of \$7,909,652 in FY23 with 19 additional APL for Probation and Parole Officers, raising the total APL to 105. Funding of \$ 8,125,783 was provided in FY24 for a full year for the 105 positions to support Information Technology, Court and Legal Services, Offender Management and Community Release Services, Inmate Re-Entry Positions, and additional Probation and Parole Officers for community supervision. These positions supported the preparation for the release of the 2,676 inmates during the initial 60-day release period and they continue to provide support for the ongoing releases resulting from the release date modifications from the legislation. The Department submitted a budget request for 19 Probation and Parole Officer positions in FY23 and an additional 31 positions in FY24 to cover the increased caseload in Probation and Parole. Funding and APL was provided for 19 additional Probation and Parole Officers in the 2022 Special Session to cover the additional caseload in community. The forecasted impact of ESC changed from the original analysis to implementation which impacted the needs for community supervision. The Department is managing the ESC community caseload with the Probation and Parole Officer position level prior to ESC and the additional 19 ESC positions provided.

The bedspace resulting from the increased Earned Sentence Credit (ESC) legislation inmate releases allowed the Department of Corrections to significantly reduce the number of state responsible inmates housed in the jails as of March 2022 was above 3,000 inmates per day to a year-to-date average of 416 inmates per day in FY23. The Commonwealth currently pays



localities a \$15.00 per day for each state-responsible offender held in a jail, this reduction in state responsible inmate population results in significantly reduced Commonwealth payments to the localities. In addition to the savings in payments, the opportunity for these inmates to be moved into DOC facilities at a faster rate allows the Department of Corrections to provide the intensive re-entry programming and services to the inmates to increase the likelihood of successful re-entry upon release. The Department's existing appropriation is sufficient to manage the cost of housing the increased number of state responsible inmates transferred into the DOC facilities. The DOC facility population has not increased or decreased from pre-ESC levels.

VirginiaCORIS Modification Costs

The total cost from VirginiaCORIS modifications for the ESC legislation was \$1,173,600 with an estimated future cost of \$120,000 for the pending change request, for a grand total of \$1,293,600. The breakdown of each change request is listed below. The grand total could change pending the submission of the change request to the vendor and final cost estimate.

CR1635 Sentence Calculation	\$864,000
CR1622 Disqualifying Offenses	\$57,600
CR1637 Sentence Good Time Override	\$24,000
CR1625 Pending Intake Estimated Release Date	\$57,600
CR1797 ESC Term Override	\$54,000
CR1805 ESC 1 Term Override	\$116,400
Estimated Pending Change Request	\$120,000
Grand Total for VirginiaCORIS Modification	\$1,173,600

Legal Impacts

To date, there has already been a significant increase in litigation and legal advice associated with the implementation and enactment of HB 5148. The Office of the Attorney General (OAG) reports that the number of new incoming cases handled by the Correctional Litigation Section has doubled as a result of the sentence credit amendments and expects that number will continue to rise. This increased workload required the OAG's Correctional Litigation Section to hire additional attorneys, paralegals, and support staff to address the workload presented by the sentence credit amendments in 2022 and 2023 alone. During the 2021 Special Session I, the General Assembly passed Budget Item Amendment 57#2 which provided the OAG with \$479,423 of funding for the 2022 fiscal year for legal representation "related to the provisions of House Bill 5148/Senate Bill 5034 of the 2020 Special Session I." However, the OAG estimates the annual cost for these additional positions, including indirect and travel-related costs at \$604,131. For the time period between October 17, 2022, through May 10, 2023, alone, the cost of litigation exceeds \$300,000. This figure accounts for attorney time spent working on litigation matters only- 1,500 hours calculated at a rate of \$200 per hour- and does not include the work done by paralegals and support staff nor does it account for any legal advice. Additionally, depending on the disposition of pending litigation challenging the amendments contained in HB 5148 and Budget Item (404)(R)(2), or any future changes/amendments to the statute, the OAG expects another influx of related litigation and requests for legal advice. Unfortunately, as explained above, estimated future legal costs are unavailable as litigation pertaining to the application of sentence credit amendments is ongoing with more on the horizon.



Section II: Number of Persons Affected

Prior to July 1, 2022, the maximum sentence credit an inmate could earn on all felony offenses committed on or after January 1, 1995, was 4.5 days credit for every 30 days served. However, as of July 1, 2022: for inmates serving a term of incarceration which includes an offense enumerated in subsection (A), the maximum amount of sentence credit that may be earned is 4.5 days credit for every 30 days served ("ESC-1"). Inmates whose term of incarcerations does not include any offense listed in subsection (A), are eligible to earn enhanced sentence credit under subsection (B) of Code § 53.1-202.3 for which the maximum amount was increased from 4.5 days to 15 days credit for every 30 days served ("ESC-2"). When the sentence credit amendments became effective on July 1, 2022, inmates with sentences eligible for ESC-2 were recalculated and ESC-2 was retroactively applied to the date they became a state responsible inmate.

By the Numbers

The tables below reveal the number of persons affected by the enhanced earned sentence credit amendments and the distribution of such persons among state correctional facilities.

As of June 27, 2022

Table with 2 columns: Facility Type, Count. Rows: Jails (1,560), VADOC State Correctional Facilities (26,191), Total State Responsible (SR) (27,751)

Effective July 1, 2022

Table with 2 columns: Description, Count. Rows: Released in 60-day period (July 1, 2022-August 31, 2022) (2,676), Release date change (Release date post August 31, 2022) (8,150), Total SR Population date change (10,826)

As of May 2023

Table with 2 columns: Facility Type, Count. Rows: Jails (756), VADOC State Correctional Facilities (24,544), Total State Responsible (SR) (25,300)

On June 27, 2022, prior to the recalculation of release dates for inmates eligible for ESC-2, VADOC inmates totaled 27,751. From July 1-August 31, 2022, VADOC released 2,676 SR inmates due to the implementation of sentence credit amendments. An additional 8,150 inmates release dates were changed effective July 1, 2022, for a total of 10,826 SR inmates receiving a change in their calculation time. A look at today's numbers reveals that VADOC's current population sits around 25,000 inmates. In summary, 35-45% of inmates during both the 60-day release period and today's calculation receive benefit from HB5148 implementation to include the budget amendment.



Inmate Demographics

Females comprise a larger proportion of SR inmates earning ESC-2 (11%) than they do of SR inmates earning the ESC-1 (5%) or of those sentenced under the parole system (GCA) (2%). More than one-half of the SR inmates earning the ESC-2 (51%) are White, while 44% of the SR inmates earning ESC-1 are White. Black inmates comprise 48% of the SR inmates earning ESC-2 but comprise more than one-half of those earning ESC-1 (55%). On average, SR inmates earning ESC-2 are younger than the SR inmates earning ESC-1 (39.1 vs. 41.3), and they are much younger than SR inmates sentenced under GCA (39.1 vs. 55.0). More than one-half of the SR inmates earning ESC-2 (56%) are under 40 years old, while less than one-half of the SR inmates earning ESC-1 (49%) are under 40 years old. One-quarter of the SR inmates earning ESC-1 are 50 years old or older, while 17% of those earning ESC-2 are 50 years old or older.

Recidivism of Released SR Inmates who Earned Enhanced ESC

Recidivism information for state responsible released since July 1, 2022, who earned ESC-2 is not yet mature. These inmates have been released for less than one year which does not allow adequate follow-up time to allow all court information to be received, verified, and entered into VirginiaCORIS. Once the data is mature, a recidivism study on these inmates will be conducted.

Section III: Six-year plan

Section three focuses on “a detailed six-year plan describing the estimated releases by facility under this act, accounting for any persons who will be transferred from jail, as well as persons who would be otherwise released in the covered years”. During FY 2022, the average state responsible sentence was 45 months, with the median sentence length being 24.5 months. While the data is not complete and still preliminary, thus far in FY 2023 the average state responsible sentence length is 49.5 months, with the median sentence length being 25 months. At this time, the Department of Corrections cannot adequately outline a six-year plan on the estimated releases by facility.

Section IV: Additional Information

In conclusion, VADOC does not have additional information to report at this time.

