

20201334D

## SENATE BILL NO. 5034

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee  
on October 14, 2020)

(Patron Prior to Substitute—Senator Boysko)

A BILL to amend and reenact § 53.1-202.3 of the Code of Virginia and to amend the Code of Virginia by adding in Article 2 of Chapter 2 of Title 53.1 a section numbered 53.1-40.02, relating to release of prisoners.

Be it enacted by the General Assembly of Virginia:

1. That § 53.1-202.3 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Article 2 of Chapter 2 of Title 53.1 a section numbered 53.1-40.02 as follows:

§ 53.1-40.02. *Conditional release of terminally ill prisoners.*

A. As used in this section, "terminally ill" means having a chronic or progressive medical condition caused by injury, disease, or illness where the medical prognosis is the person's death within 12 months.

B. Any person serving a sentence imposed upon a conviction for a felony offense, except as provided in subsection C, who is terminally ill may petition the Parole Board for conditional release.

C. A person who is terminally ill and is serving a sentence imposed upon a conviction for one of the following offenses shall not be eligible to petition the Parole Board for conditional release:

1. A Class 1 felony;
  2. 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 § 18.2-46.5, subsection A or B of § 18.2-46.6, or § 18.2-46.7;
  5. Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2, except for a violation of § 18.2-49.1;
  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 § 18.2-51.7, 18.2-54.1, or 18.2-54.2, 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, except, when not committed against a minor, a violation of subdivision A 5 of § 18.2-67.3, § 18.2-67.4:1, subsection B of § 18.2-67.5, or § 18.2-67.5:1;
  11. Any violation of § 18.2-90 or 18.2-93;
  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 involving a minor victim;
  14. Any felony offense in Article 4 (§ 18.2-362 et seq.) of Chapter 8 of Title 18.2 involving a minor victim, except for a violation of § 18.2-362 or 18.2-370.5 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 involving a minor victim, except for a violation of subsection A of § 18.2-374.1:1;
  16. Any violation of § 18.2-481, 40.1-100.2, or 40.1-103; or
  17. A second or subsequent felony violation of the following offenses 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. Voluntary or involuntary manslaughter under Article 1 (§ 18.2-30 et seq.) of Chapter 4 of Title 18.2 or any crime punishable as such;
    - b. Any violation of § 18.2-41 or 18.2-42.1;
    - c. Any violation of subsection C of § 18.2-46.6;
    - d. Any violation when done unlawfully but not maliciously of § 18.2-51 or 18.2-51.1;
    - e. Arson in violation of § 18.2-77 when the structure burned was occupied or a Class 3 felony violation of § 18.2-79;
    - f. Any violation of § 18.2-89 with the intent to commit any larceny or § 18.2-92;
    - g. Any violation of subsection A of § 18.2-374.1:1;
    - h. Any violation of § 18.2-423, 18.2-423.01, 18.2-423.1, 18.2-423.2, or 18.2-433.2; or
    - i. Any violation of subdivision E 2 of § 40.1-29.
  - D. The Parole Board shall promulgate regulations to implement the provisions of this section.
- § 53.1-202.3. Rate at which sentence credits may be earned; prerequisites.

- 60 A. A maximum of ~~four and one-half~~ 4.5 sentence credits may be earned for each 30 days served on  
61 a sentence for:
- 62 1. A Class 1 felony;
  - 63 2. Solicitation to commit murder under § 18.2-29 or any violation of § 18.2-32, 18.2-32.1, 18.2-32.2,  
64 or 18.2-33;
  - 65 3. Any violation of § 18.2-40 or 18.2-45;
  - 66 4. Any violation of subsection A of § 18.2-46.5, of subsection D of § 18.2-46.5 if the death of any  
67 person results from providing any material support, or of subsection A of § 18.2-46.6;
  - 68 5. Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2;
  - 69 6. Any malicious felonious assault or malicious bodily wounding under Article 4 (§ 18.2-51 et seq.)  
70 of Chapter 4 of Title 18.2, any violation of § 18.2-51.6 or 18.2-51.7, or any felony violation of  
71 § 18.2-57.2;
  - 72 7. Any felony violation of § 18.2-60.3;
  - 73 8. Any felony violation of § 16.1-253.2 or 18.2-60.4;
  - 74 9. Robbery under § 18.2-58 or carjacking under § 18.2-58.1;
  - 75 10. Criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of  
76 Title 18.2;
  - 77 11. Any violation of § 18.2-90;
  - 78 12. Any violation of § 18.2-289 or subsection A of § 18.2-300;
  - 79 13. Any felony offense in Article 3 (§ 18.2-346 et seq.) of Chapter 8 of Title 18.2;
  - 80 14. Any felony offense in Article 4 (§ 18.2-362 et seq.) of Chapter 8 of Title 18.2, except for a  
81 violation of § 18.2-362 or subsection B of § 18.2-371.1;
  - 82 15. Any felony offense in Article 5 (§ 18.2-372 et seq.) of Chapter 8 of Title 18.2, except for a  
83 violation of subsection A of § 18.2-374.1:1;
  - 84 16. Any violation of subsection F of § 3.2-6570, any felony violation of § 18.2-128, or any violation  
85 of § 18.2-481, 37.2-917, 37.2-918, 40.1-100.2, or 40.1-103; or
  - 86 17. A second or subsequent violation of the following offenses, in any combination, when such  
87 offenses were not part of a common act, transaction, or scheme and such person has been at liberty as  
88 defined in § 53.1-151 between each conviction:
    - 89 a. Any felony violation of § 3.2-6571;
    - 90 b. Voluntary manslaughter under Article 1 (§ 18.2-30 et seq.) of Chapter 4 of Title 18.2;
    - 91 c. Any violation of § 18.2-41 or felony violation of § 18.2-42.1;
    - 92 d. Any violation of subsection B, C, or D of § 18.2-46.5 or § 18.2-46.7;
    - 93 e. Any violation of § 18.2-51 when done unlawfully but not maliciously, § 18.2-51.1 when done  
94 unlawfully but not maliciously, or § 18.2-54.1 or 18.2-54.2;
    - 95 f. Arson in violation of § 18.2-77 when the structure burned was occupied or a Class 3 felony  
96 violation of § 18.2-79;
    - 97 g. Any violation of § 18.2-89 or 18.2-92;
    - 98 h. Any violation of subsection A of § 18.2-374.1:1;
    - 99 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
    - 100 j. Any violation of subdivision E 2 of § 40.1-29.
- 101 The earning of sentence credits shall be conditioned, in part, upon full participation in and  
102 cooperation with programs to which a person is assigned pursuant to § 53.1-32.1.
- 103 B. For any offense other than those enumerated in subsection A for which sentence credits may be  
104 earned, earned sentence credits shall be awarded and calculated using the following four-level  
105 classification system:
- 106 1. Level I. For persons receiving Level I sentence credits, 15 days shall be deducted from the  
107 person's sentence for every 30 days served. Level I sentence credits shall be awarded to persons who  
108 participate in and cooperate with all programs to which the person is assigned pursuant to § 53.1-32.1  
109 and who have no more than one minor correctional infraction and no serious correctional infractions as  
110 established by the Department's policies or procedures.
  - 111 2. Level II. For persons receiving Level II sentence credits, 7.5 days shall be deducted from the  
112 person's sentence for every 30 days served. Level II sentence credits shall be awarded to persons who  
113 participate in and cooperate with all programs, job assignments, and educational curriculums to which  
114 the person is assigned pursuant to § 53.1-32.1, but who require improvement in not more than one area  
115 as established by the Department's policies or procedures.
  - 116 3. Level III. For persons receiving Level III sentence credits, 3.5 days shall be deducted from the  
117 person's sentence for every 30 days served. Level III sentence credits shall be awarded to persons who  
118 participate in and cooperate with all programs, job assignments, and educational curriculums to which  
119 the person is assigned pursuant to § 53.1-32.1, but who require significant improvement in two or more  
120 areas as established by the Department's policies or procedures.
  - 121 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.

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 December 1, 2022. 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 January 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 January 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.

183 6. That the Department of Corrections shall ensure that educational, vocational, counseling, and  
184 substance abuse rehabilitative and reentry programs are available at all probation and parole  
185 offices.  
186 7. That the Department of Criminal Justice Services shall continue to administer grant funding to  
187 private entities for the purpose of assisting in reentry services.