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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

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IN THE

SUPREME COURT OF VIRGINIA

At Richmond

RECORD NO. 810706

EDWARD C. MORRIS, Warden of the
Mecklenburg Correctional Center,

Appellant,

v.

LEROY SMITH, JR.,

Appellee.

APPENDIX

MARSHALL COLEMAN
Attorney General of Virginia

THOMAS D. BAGWELL
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

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ASSIGNMENT OF ERROR

The Court erred in ruling that Leroy Smith was entitled to good time credit on his conviction of November 18, 1976 after July 1, 1977, when § 53-213 was amended.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF POWHATAN

LEROY SMITH, JR., Petitioner,	)	
v.	)	VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS
EDWARD C. MORRIS, Warden, Respondent.	)	

TO THE HONORABLE JUDGE OF THE AFORESAID COURT:

1. He is an inmate of the Virginia Department of Corrections, presently incarcerated at the Mecklenburg Correctional Center.

2. Respondent Edward C. Morris is the Warden of the Mecklenburg Correctional Center.

3. On or about May 29, 1973, petitioner was committed to the custody of the Virginia Department of Corrections to serve a sentence of eight (8) years for statutory burglary.

4. On or about November 18, 1976, the petitioner while incarcerated at Powhatan Correctional Center, was convicted in this court on charges of possession of an illegal weapon and unlawful wounding. Petitioner received consecutive sentences of one and two years respectively on these charges.

5. Based on "good time credit" to which he was lawfully entitled, petitioner's release date on his burglary sentence was determined to be on August 15, 1978. As a result of forfeited good time, that release date was delayed until October 15, 1978.

6. Based on "good time credit" to which he was entitled pursuant to Va. Code § 53-213, petitioner should have been entitled to release on mandatory parole on the sentences imposed by this court on June 6, 1980.

7. Respondent refused to release petitioner on that date and petitioner has been notified that he will not be released until June 7, 1981.

8. On information and belief, respondent has refused to give petitioner credit on his sentence for "good time" to which he is lawfully entitled.

COUNT II

9. Petitioner realleges each and every allegation contained in paragraphs 1 through 8 of his Petition.

10. By refusing to release him on June 6, 1980, respondent has violated petitioner's right to due process and equal protection of the laws as guaranteed by the 5th and 14th Amendments to the U. S. Constitution and Article I § 11 of the Virginia Constitution.

WHEREFORE, petitioner respectfully requests that the Court issue a writ of habeas corpus directing respondent to release him from the custody forthwith.

LEROY SMITH, JR.

Leroy Smith

Gerald T. Zerkin
Stephen W. Bricker
BRICKER & ZERKIN
701 E. Franklin St.
Suite 1505

STATE OF Virginia)
County OF Mecklenburg) to wit:

This day personally appeared before me, a Notary Public in and for the jurisdiction aforesaid, Leroy Smith, Jr., and swore that the facts contained in the foregoing Verified Peition For A Writ of Habeas Corpus were true to the best of his knowledge and belief.

Given under my hand this 18 day of July, 1980.

Constance H Pracey
Notary Public

My commission expires: 8/21/83.

Received and filed this the 22nd day of July, 1980
W. E. Mapley Jr Clerk
By, Kathryn C. Powers DC

Form No. 7 (B-12-71-6M)

Location: _____

PRISON RECORD

Date August 20, 1980

Name Leroy Smith, Jr. Number 101340 Race Black

Alias

Committed May 29, 1973

Age 12-3-54 Married, Single, Widower, Divorced, Separated, Occupation

Court & Date 1)3-28-72(revo 4-30-73) Richmond City Hustings, Statutory Burglary, 8 yrs

2)11-18-76, Powhatan Co Cir, Poss Illegal Weapon, 1 yrFLAT Unlawful Wounding, 2 yrs FLAT

Crime 3)5-11-73, Richmond City Police Court, Petit Larceny,30 days Term _____ Years

(DOC) Contempt, 30 days(DOC) 4)9-8-79, Richmond City Circuit, Possession

of Weapon, 3 months(JAIL)

Added for escape NONE Years

Added for Second, Third Conviction NONE Years. Total Term 11 yrs(3 yrs FLAT) Years

Served 7 Years 2 Months 21 Days 5 months 44 days jail time included.

Term Expires 8-7-81 (institution release date)

Eligible for Parole 11-10-75

PRISON RULES VIOLATED

STATE OF VIRGINIA, CITY OF RICHMOND

CERTIFIED A TRUE COPY

THIS 29 DAY OF Aug. 1980

M. U. Mattney

NOTARY PUBLIC

My Commission Expires Jan. 9, 1982

Barbara Gail Loomis CUSTODIAN

BUREAU OF RECORDS

DEPARTMENT OF CORRECTIONS, RICHMOND, VA.

5

SMITH, LEROY VSP# 101340

Committed to the Department: 5-29-73
Time Started: 4-15-73 (Allowed 44 days jail credit.)

COURT & DATE		CRIME	TERM	TENTATIVE RELEASE DATE
3-28-72(revo 4-30-73)	Richmond City Hustings	Statutory	8 yrs	8-18-78
11-26-73	Thirty (30) days taken for refusing to obey direct order.			9-7-78
9-5-74	Thirty (30) days taken for threatening bodily harm.			9-27-78
11-18-76	Powhatan Co Cir	Poss Illegal Weapon	1 yr FLAT	9-27-79
		Unlawful Wounding	2 yrs FLAT	9-27-81
4-4-80	Received 30 days adjusted discharged date per 53-37.			8-27-81

JAIL SENTENCES:

5-11-73	Richmond City Police	Larceny	30 days DOC	9-16-81
		Contempt	30 days DOC	10-6-81

TENTATIVE MANDATORY PAROLE DATE, 6-7-81, AFTER ALLOWANCES PER 53-251.3.

9-8-79	Richmond Ci Circuit	Poss of Weapon	3 mos jail

Mr. Smith's parole eligibility date is 11-10-75. His tentative mandatory parole release date is 6-7-81 (to serve a 3 mos jail sentence) and his tentative release date is 8-7-81.

This is to certify that the foregoing is a true and accurate summary of the prison record on inmate Leroy Smith, Jr. now confined at the Mecklenburg Correctional Center. The said summary is taken from the records on file with the Virginia Department of Corrections, Classification and Records Unit, Court and Legal Services Section.'

Barbara Gail Loomis

Barbara Gail Loomis, Corrections
Assistant Criminal Records Custodian

STATE OF VIRGINIA, CITY OF RICHMOND
CERTIFIED A TRUE COPY
THIS 20th DAY OF Aug 1980
M. V. Mitchell
NOTARY PUBLIC

My Commission Expires Jan. 9, 1982

Petitioner,	)	PETITIONER'S MEMORANDUM OF LAW
v.	)	
EDWARD C. MORRIS, Warden,	)	
Respondent.	)	

The sole issue presented by this case is the petitioner's entitlement to good time credit on the sentences imposed by this Court on November 18, 1976. On that date the Court imposed sentences of one and two years respectively on charges of unlawful possession of a weapon and malicious wounding. Since the petitioner was already serving time for prior offenses, the sentences imposed by this Court were consecutive to those he was already serving. According to the Department of Correction's calculations, petitioner's release date on his initial sentence was August 18, 1978 (see ¶ 4 of Respondent's Motion To Dismiss), at which time he began serving the three years imposed by this Court.

The respondent concedes that the petitioner is not being given good time credit on these sentences pursuant to Virginia Code § 53-213, arguing that petitioner is not "allowed good conduct allowance for crimes while committed in the Penitentiary." While Virginia Code § 53-213 as written in 1976 precluded the application of good time credit to such a sentence, that statute was amended by the 1977 General Assembly to eliminate the exemption. Thus by the time petitioner began serving the sentences imposed by this Court, good time credit was applied to sentences imposed for crimes while committed to the Penitentiary.

Respondent's position is, apparently, that the amendment to the statute does not apply to sentences imposed prior to the effective date of the amendment, even though such sentences or

portions of such sentences are not served until after that date. Petitioner contends, however, that good time credit is not part of the sentence imposed and that changes in the good time allowance are applicable to all inmates. Indeed, such a conclusion is necessitated not only by the principles of statutory construction, but by opinions of the Attorney General himself in regard to various aspects of § 53-213.

Although the "Prison Record" submitted by the respondent indicates that the sentences in question are "flat," in fact no such determination was made by the Court. In its judgment of commitment the Court sentenced the petitioner "to confinement in the penitentiary of this Commonwealth for the term of one (1) year..." on the weapons charge and to "confinement in the penitentiary of this Commonwealth for the term of two (2) years..." on the wounding charge. No reference was made to "flat time" or to the availability of good time credit. Rather, the Department of Corrections administratively determined that good time would not be applied.

The proscription against the retroactive application of statutes does not apply where the right involved arises by operation of law and not by contract or judgment. See Gloucester Realty Corp. v. Guthrie, 182 Va. 869, 875 (1944). Such is clearly the case here, since the entitlement to good time credit, if any, is not part of the sentencing statute nor of the judgment of conviction, but rather is applied by the Department once the inmate is incarcerated.

The Attorney General has held that good time credit is not available until earned. In an Opinion dated October 9, 1979, directed to the chairman of the Virginia Parole Board, a copy of which is attached hereto, Attorney General Coleman stated that § 53-213 provides credit "for good conduct only after it has been earned."

> "A prisoner's date of final discharge should be determined by the length of his sentence less any credit...he may have received. The date of final discharge is not fixed; it changes every time a credit is earned or lost."

If an inmate's entitlement to good-time credit under § 53-213 is not fixed at the time of sentencing for the purposes of parole eligibility and final discharge, then it is inconsistent to argue, as the Attorney General does here that petitioner's entitlement to good-time credit under that statute was fixed at the time of sentencing. Rather, a consistent application of the Attorney General's interpretation of § 53-213 requires the conclusions that the petitioner's entitlement to good-time credit was not fixed and that he was so entitled as to any portion of the sentence actually served after the statute was amended.

Although amendments to statutes are generally given a prospective application (see Virginia Code § 1-16), it is essential to recognize the nature of the prospective/retrospective dichotomy.

> "A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; rather, a law is retrospective only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage." Sizemore v. State Workmen's Compensation Commissioner, 219 S.E.2d 912, 916 (W.Va. 1975).

Thus, while changes in the law are generally held inapplicable to vested or contractual rights, such changes are effective as to rights whose existence depends upon the happening of another event, for such rights "are not acquired or completed" until the event occurs. Charles v. State Workmen's Compensation Commissioner, 241 S.E.2d 816, 819 (W.Va. 1978).

In State ex rel, Kittle v. County Court, 84 W.Va. 212, 99 S.E. 439 (1919), the West Virginia Supreme Court applied an amendment pertaining to the disposition of interest from bonds

proceeds to interest earned after the effective date of the amendment on bonds sold prior to that date.

> "There is not a word in it indicative of purpose to except such interest, nor is there any ground upon which an implied exception can stand. This interpretation does not make the statute retroactive. It gives the district road funds the benefit of the interest on such deposits only from the date on which it took effect." 99 S.E. at 440.

Although the context is very different, the principle is the same in the instant case. The good time credit is earned in the same sense that interest is earned. The credit is dependent upon the occurrence of a subsequent event, that is, being held in confinement for a given period without violating any written jail or prison rule or regulation. Virginia Code § 53-213. Thus it is totally inconsistent for the Attorney General to argue that this petitioner's right to good time credit, if any, was fixed at the time of sentencing while arguing in the context of parole eligibility that good time credit under the same statute is not earned until the time is actually served.

CONCLUSION

The petitioner is entitled to good time credit on the sentences imposed by this Court as to all time served on such sentences subsequent to the effective date of the amendment. The right to good time credit is not part of the sentence or judgment of the Court, but rather arises by operation of law. Furthermore, the application of the new statute to the petitioner is prospective in nature, since, as interpreted by the Attorney General, the credit available under Virginia Code § 53-213 is not fixed, but must be actually earned. The petitioner, therefore, respectfully requests that the Court order that he be immediately released from custody.

LEROY SMITH, JR.

Commonwealth of Virginia

MARSHALL COLEMAN
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
SUPREME COURT BUILDING
1101 EAST BROAD STREET
RICHMOND, VIRGINIA 23219
804-786-2071

October 9, 1979

The Honorable Pleasant C. Shields, Chairman
Virginia Parole Board
P. O. Box 26963
Richmond, Virginia 23261

My dear Mr. Shields:

You have inquired as to the proper method of computing discretionary parole eligibility as a result of the amendments to §§ 53-211 and 53-213 of the Code of Virginia (1950), as amended.

Sections 53-211 and 53-213 provide ten days good conduct credit for every twenty days prisoners serve without violating any written jail or prison rules or regulations. The amendments to these sections provide that any good conduct credit allowed under such sections shall be taken into consideration in determining parole eligibility.

Two methods of computing parole eligibility under these sections have been considered. They are:

1. Whole sentence--parole date is based on the prisoner's sentence less the total amount of good time he could earn.

2. Incremental sentence--parole date is based on the prisoner's sentence less the amount of good time <u>actually</u> <u>earned</u> at the point of eligibility.

Sections 53-211 and 53-213 provide credit for good conduct only after it has been earned. In my opinion, therefore, only the incremental sentence method may be used in determining discretionary parole eligibility. Otherwise a prisoner could be considered eligible for parole sooner than he deserved.

Another amendment by the 1979 Session of the General Assembly, § 53-251.3, also impacts upon the duties of the Parole Board. This section is commonly referred to as mandatory parole and requires the Parole Board to discharge a prisoner on parole when six months remain in his sentence until his date of final discharge.

A prisoner's date of final discharge should be determined by the length of his sentence less any credit (for good conduct, vocational education or extraordinary services) he may have received. The date of final discharge is not fixed; it changes every time a credit is earned or lost. As I have previously stated with regard to discretionary parole, the Code sections allowing a prisoner credit for time toward the service of his sentence require that any such credit must be earned before it can be taken into consideration in computing his date of final discharge. Section 53-251.3 becomes effective when six months remain between the total of time served and the prisoner's date of final discharge.

With kindest regards, I remain

Sincerely yours,

Marshall Coleman

Marshall Coleman
Attorney General

3/135

IN THE CIRCUIT COURT OF THE COUNTY OF POWHATAN

Leroy Smith, Jr. Retitioner v. Edward C. Morris, Warden, Respondent	)	STIPULATION OF FACT

Now come the petitioner, Leroy Smith, Jr. and the respondent Edward C. Morris, by Counsel, and enter into the following stipulations:

1. Petitioner was convicted of statutory burglary in the Circuit Court of the City of Richmond on March 28, 1972. The suspension of petitioner's sentence was revoked on April 30, 1973 and he was sentenced to eight years in the Penitentiary.

2. On November 18, 1976, petitioner was convicted in the Circuit Court of Powhatan County of possession of an illegal weapon and unlawful wounding, receiving sentences of one and two years respectively. Both of these offenses were committed while petitioner was incarcerated.

3. The Department of Corrections has not given petitioner any good time credit on the sentences imposed by the Circuit Court of Powhatan County by virtue of the pre-1977 version of Va. Code § 53-213.

4. Exhibit "A" attached to these stipulations is a copy of the judgment of conviction as to the two Powhatan County charges.

Leroy Smith, Jr.

By Gerald T. Zerkin
Gerald T. Zerkin, p.q.

Edward C. Morris

By Thomas D. Bagwell
Thomas D. Bagwell, p.d.

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VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF POWHATAN, THIS 18TH DAY OF NOVEMBER, 1976.

COMMONWEALTH OF VIRGINIA

vs.

LEROY SMITH, JR.

This day came again the Attorney for the Commonwealth, and Leroy Smith, Jr., who stands indicted for two (2) felonies, to-wit:

#1-did feloniously have in his possession a knife not authorized by the superintendent which is capable of inflicting death or bodily injury, etc.; and

#2-did feloniously and maliciously cause bodily injury to David Fleming Montgomery with the intent to maim, disfigure, disable or kill, etc.;

was led to the bar in the custody of the Sheriff of this Court, and came also Edwin Gadberry, III, his attorney heretofore appointed.

Whereupon the accused was arraigned and after private consultation with and being advised by his attorney, pleaded not guilty to each of the indictments, which pleas were tendered by the accused in person. And thereupon, after having been first advised by his attorney and by the Court, of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury, and with the concurrence of the Attorney for the Commonealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law, and having heard the evidence and argument of counsel, doth find the accused guilty of:

#1-felonious possession of an illegal weapon; and
#2-unlawful wounding

as charged in the indictments.

And it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant is hereby:

#1-sentenced to confinement in the penitentiary of this Commonwealth for the term of one (1) year and that the Commonwealth of Virginia do recover against the defendant its costs in the amount of $152.50 by it about its prosecution in this behalf expended; and

#2-sentenced to confinement in the penitentiary of this Commonwealth for the term of two (2) years and that the Commonwealth of Virginia do recover against the defendant its costs in the amount of $152.50 by it about its prosecution in this behalf expended.

After pronouncing sentences, the Court advised the defendant of his right to petition for an appeal to the Supreme Court of Virginia and of his right to proceed in forma pauperis and to have the assistance of court-appointed counsel. At which time, the defendant advised the Court of his desire to appeal from the judgment of this Court to the Supreme Court of Virginia, and to proceed in forma pauperis.

Whereupon it is ORDERED that the defendant Leroy Smith, Jr., be and he hereby is, allowed to proceed in forma pauperis and it is further ORDERED that Edwin Gadberry, III, be and he hereby is, appointed counsel to assist the defendant with the said appeal.

It is further ORDERED that the electronic recording of these proceedings be transcribed to writing; that the original of the said writing shall be delivered to the Clerk of this Court and marked "Filed" at which time the same shall become a part of the record in these proceedings and it is further ORDERED that the Clerk shall deliver a copy of the said transcript to the Attorney for the Commonwealth and a copy of the said transcript to Counsel for the defendant.

The Court orders that the prisoner be allowed NO days credit for the time spent in jail awaiting trial.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorney was likewise personally present and capably represented the defendant, for which services he is allowed an attorney's fee of $100.00.

And the prisoner is remanded to the Virginia State Penitentiary from whence he came.

Commonwealth of Virginia

OFFICE OF THE ATTORNEY GENERAL
~~xxxxxxxxxxxxxxxxxxxxxxxx~~
~~xxxxxxxxxxxxxxxxxxxxxxxx~~
RICHMOND, VIRGINIA 23219
~~xxxxxxxxxxxx~~

MARSHALL COLEMAN
ATTORNEY GENERAL

900 Fidelity Building
830 East Main Street

(804) 786-6563

November 19, 1980

The Honorable Thomas V. Warren, Judge
P. O. Box 62
Nottoway, Virginia 23955

Re: Leroy Smith, Jr. v. Edward C. Morris, Warden

Dear Judge Warren:

Since I filed my Memorandum of Law on November 3, 1980, I have discovered a case decided by the United States District Court for the Western District of Virginia, Roanoke Division, which appears to be on point. I am, therefore, enclosing a copy of this case for your consideration.

Very truly yours,

Thomas D. Bagwell

Thomas D. Bagwell
Assistant Attorney General

3:22/110
Enclosure

cc: Gerald T. Zerkin, Esquire
Ginter Professional Building
1001 West Brookland Park Boulevard
Richmond, Virginia 23220

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Clerk's Office U. S. Dist. Ct.
AT ROANOKE, VA.
FILED
OCT 30 1980
JOYCE F. WITT, CLERK
By: Jane Johnson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ROY E. HUTCHENS, Plaintiff	)	
	)	Civil Action Number 80-0286(R)
vs.	)	
	)	O R D E R
JULIAN U. PUGH, Defendant	)	

In accordance with written Memorandum Opinion this day filed, it is ADJUDGED and ORDERED that:

1) defendant's motion for summary judgment is granted,

2) this case is dismissed and stricken from the docket.

The clerk is directed to send a certified copy of this order to the plaintiff and to counsel of record for the defendant.

ENTER:

Ted Dillon
United States District Judge

October 30, 1980

A TRUE COPY, TESTE:

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OCT 30 1980

JOYCE F. WITT, CLERK
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ROY E. HUTCHENS, Plaintiff	)	
	)	Civil Action Number 80-0286(R)
vs.	)	MEMORANDUM OPINION
JULIAN U. PUGH, Defendant	)	By: Ted Dalton U. S. District Judge

Plaintiff Roy E. Hutchens is presently confined in Botetourt Campt #25, Troutville, Virginia. Proceeding pro se and alleging jurisdiction under 42 U.S.C. §1983, he asserts that the defendant's refusal to allow him good conduct time toward a sentence received pursuant to his felony conviction in 1975 is improper.

Specifically, the plaintiff asserts that he received a three year sentence after conviction on June 18, 1975 for inflicting bodily injury upon a jailor. He further asserts that this three year sentence was to run consecutively with an earlier-received five year sentence for robbery. It appears that on August 27, 1979, the plaintiff was convicted of larceny and was sentenced to sixty additional days; he alleges further that he lost his parole status and was "made to serve the remainder of his eight (8) year (5+3) sentence, plus the sixty (60) days."

The crux of the plaintiff's complaint was that the defendant informed him on February 26, 1980 that he was to serve "flat time" on the three year sentence. Apparently, the term "flat time" entails that no good time allowances would be credited towards the three year sentence. The plaintiff feels that this procedure is unconstitutional and that it is in violation of the controlling

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as amended. As a result, he requests that the court issue an order directing the defendant to credit his "good time" toward the three year sentence imposed for the felony he committed while incarcerated.

The defendant responded in his answer and motion for summary judgment. He submits the affidavit of Joyce Johnson, a time clerk for the Department of Corrections. Both the defendant and the affiant assert that the plaintiff received a sentence on June 2, 1975 for inflicting bodily injury while incarcerated. The defendant argues that prior to the statutory amendment to §53-213 in 1977, inmates were not eligible to have good time credited to their sentences. Thus, defendant contends that when the plaintiff was returned as a parole violator, he had to serve his sentence in accordance with the statute as it existed at the time of his conviction.

The plaintiff responded to this argument in a pleading styled "Traverse tothe Defendant's Return." Essentially, he interprets the language of Code of Virginia, Section 53-213, as amended, as applying retroactively to encompass the plaintiff's three year sentence in 1975. Accordingly, he reasserts that good time credits should be applied in reducing the three year sentence.

In analyzing the plaintiff's contentions, his pro se complaint is entitled to a liberal construction. However, where it is beyond doubt that the plaintiff could prove no set of facts of constitutional consequence, it is inappropriate and indeed futile to grant an opportunity for him to present supporting evidence. Cruz v. Beto, 405 U.S. 319 (1972); Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir.) cert. denied, 439 U.S. 970 (1978). In view of the statutory authority discussed below, it is clear that the plaintiff has failed to state a cognizable claim. Therefore, the court determines initially that the defendant's computation is in accord with statutory authorization, and, secondly, that the statutory scheme is not constitutionally offensive.

Despite the rather expansive language utilized in Section 53-213 following its amendment in 1977 and 1979, the court does not find the plaintiff's argument for retroactive application to be compelling. In 1977, approximately two years after the three year sentence in question was imposed, the statute was amended by deleting the following provision:

> ... except that no prisoner who is convicted of a felony committed while in jail awaiting removal to the Department of Corrections, or while confined in any part of the Department of Corrections, shall be eligible for any such credit upon any term of confinement received as a result of conviction of such felony. Acts of Assembly, Ch. 182 (Vol. 1, 1977).

Thus, it is clear that the plaintiff's three year sentence was affixed following conviction for a felony committed while incarcerated; barring retroactive application of the amended statute that allows good time to be credited without the old exception, the plaintiff has no argument for crediting "good time" toward his sentence.

In assessing the retroactivity issue, Code of Virginia, Section 1-16 is particularly insightful. The text of the statute provides that:

> §1-16. Repeal not to affect liabilities; mitigation of punishment. - No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shallconform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. (Code 1919, §6) Code of Virginia, Section 1-16 (emphasis supplied).

In the case at bar, the three year sentence corresponds to the statutory terms "penalty, forfeiture or punishment." Thus, the offense was committed and the penalty imposed in 1975, well before the amendment of Code of Virginia. Section 53-213. As a result, Section 1-16 prohibits the "new law" as manifested by the statutory amendment, from repealing the offense and its attendant penalty as provided by the pre-amendment statute. As that statute explicitly provides that no credit upon the additional term of confinement will be provided for one who commits a felony while incarcerated, the court determines that the defendant's refusal to credit good time was proper.

The court does not find that the procedure resulting in no credit given toward the term of confinement is constitutionally violative. The plaintiff does not assert that the application of the statute is such as to violate the Equal Protection Clause of the Fourteenth Amendment. Neither does the plaintiff allege that he was denied credit for "jail time" while awaiting trial on a bailable offense or pending appeal. See Durkin v. Davis, 538 F.2d 1037 (4th Cir. 1976).

Finding the defendant's actions to be in accord with the pertinent statutory and constitutional provisions, the court must grant the defendant's motion for summary judgment.

ENTER:

United States District Judge

October 30, 1980

A TRUE COPY, TESTE:

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-6034

Roy E. Hutchens,

Appellant,

v.

Julian U. Pugh, Chief, Transportation & Record Classification & Record Unit, Department of Corrections,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Ted Dalton, District Judge.

Submitted: February 13, 1981 Decided: March 3, 1981

Before WINTER, BUTZNER, and RUSSELL, Circuit Judges.

(Roy E. Hutchens, Appellant Pro Se. Guy W. Horsley, Jr., Assistant Attorney General, for the Appellee.)

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PER CURIAM:

Roy Hutchens, a Virginia inmate, appeals from the district court's dismissal of his claim for relief under 42 U.S.C. § 1983. Hutchens contends that he is being improperly denied good-time credits for a three-year sentence imposed in 1975 upon his felony conviction. He seeks both declaratory and injunctive relief and damages.

To the extent that Hutchens seeks as relief his immediate or speedier release from confinement, the suit must be brought under 28 U.S.C. § 2254. Preiser v. Rodriguez, 411 U.S. 475, 489 (1973). Because Hutchens has not alleged that he presented his claim to the Virginia state courts, he has not satisfied the exhaustion requirement of 42 U.S.C. § 2254(b). Accordingly, the portion of this action requesting restoration of Hutchens' good-time credits is dismissed for failure to exhaust state remedies.

Hutchens also requests damages for the deprivation of his constitutional right to due process. Both Preiser v. Rodriguez, supra at 494, and Wolff v. McDonnell, 418 U.S. 539, 555 (1974), expressly contemplate that a state prisoner may properly pursue damages in a section 1983 action without exhaustion of state remedies, and that the damage action may go forward while actual restoration of good-time credits is sought in state proceedings. Therefore, the district court properly considered Hutchens' claim for damages. Upon review of the record and the district court's opinion, we find that the district court correctly

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found Hutchens' claim to be without merit. See Hutchens v. Pugh, C/A No. 80-0286-R (W.D. Va., Nov. 10, 1980).

We dispense with oral argument because the dispositive issues recently have been decided authoritatively. The portion of this suit seeking restoration of good-time credits is dismissed, and the judgment of the district court regarding the damages claim is affirmed.

Petitioner

v.

EDWARD C. MORRIS,

Respondent

PETITIONER'S REPLY MEMORANDUM

In reply to the memorandum of the respondent and subsequent submission of the Memorandum Opinion in Hutchens v. Pugh, C.A. No. 80-0286(R), W.D. VA. (Oct. 30, 1980), the petitioner respectfully suggests that the District Court's decision in Hutchens should not be followed here. Petitioner notes that the plaintiff in Hutchens proceeded pro se and thus the District Judge did not have the benefit of opposing counsel in framing the issue. This court is certainly not bound by the federal court's interpretation of Virginia law and petitioner would urge the court to give little weight to a decision which was rendered in the absence of opposing counsel and which clearly suffers from that absence.

ARGUMENT

It is in the framing of the issue that the Hutchens court erred. In Hutchens, the court considered the issue as the "retroactive application" of the amended statute. Petitioner concedes that if the requested relief did, in fact, require the retroactive application of the amendment, his claim would be without merit. However, while the Hutchens court assumed, without analysis, that the plaintiff was requesting the retroactive application is sought and for this reason he seeks good time credit only for time actually served after the effective date of the amendment.

The Hutchens court makes no reference to the Attorney General's opinions which interpret § 53-213 to require that good time credit must be actually earned and cannot be fixed at the time of sentencing. Again, the pro se plaintiff probably did not have access

to these opinions and the Court was likely unaware of their existence. Thus in rendering his opinion, the District Judge likely did not know that the state official charged with the interpretation of state law had determined that the entitlement to good time credit, like the entitlement to interest on a bond, has to be earned. State ex rel, Kittle v. County Court, 99 S.E. 439, 440 (W. Va. 1919). The Hutchens court, therefore, erroneously assumed that a retroactive application of the statute was sought because it framed the issue in terms of a fixed or vested entitlement in contrast to the unvested view espoused by the Attorney General in the opinion letter of October 9, 1979, which is attached to petitioner's original memorandum.

The fundamental issue presented by this case is not whether the petitioner is entitled to a retroactive application of the amended statute, but rather whether or not the application of the amendment to time served after its effective date is, in fact retroactive in nature. If the court finds that the right to good time credit is part of the sentence imposed and therefore vested at that time, then the court should find for the respondent. However, if the court finds that good time credit is not vested at the time of sentencing, but must be earned, then the court should find that the relief requested by the petitioner is prospective in nature. In support of this latter conclusion, petitioner asserts that (a) the right to good time credit is not part of the sentence imposed or judgment of conviction; (b) that good time credit is granted or forfeited through administrative procedures and not by the sentencing court; (c) that the statutes pertaining to good time credit appear in the correction title of the code and not in the criminal title; (d) that the Attorney General himself has interpreted §53-213 to "provide credit for good conduct only after it has been earned."

The respondent's suggestion in his memorandum that the pri-

they argue it has been earned.

The respondent's suggestion in his memorandum that the prison records indicate that the sentences in question were to be served as flat time avoids the actual fact, as stipulated, that the sentence imposed by the court, as reflected in the judgment of conviction makes no reference to good time credit. Indeed, petitioner knows of no authority by which a court could, as part of the sentencing process, grant or deny good time credit. Rather, the prison records merely reflect the administrative actions of the Department of Corrections.

The Hutchens court's rejection of the constitutional argument is based on the same misinterpretation of the issue. Once again, if this court concludes that the petitioner's claim to good time credit after the effective date of the amendment is prospective in nature, then it is clear that as of that date the petitioner stood on an equal footing with all other inmates and was entitled to an equal application of the law under the Fourteenth Amendment to the U.S. Constitution.

CONCLUSION

The petitioner respectfully submits, based on the nature of good time credit as discussed herein and the analysis of the retrospective-prospective dichotomy provided by the relevant case law cited in petitioner's original memorandum, that the court should find in petitioner's favor and order the respondent to fix a release date consistent with the application of good time credit since July 1, 1977.

Leroy Smith, Jr.

By _____
Counsel

11th Judicial Circuit

THOMAS V. WARREN
JUDGE'S CHAMBERS
NOTTOWAY, VIRGINIA

COUNTY OF AMELIA
COUNTY OF DINWIDDIE
COUNTY OF NOTTOWAY
CITY OF PETERSBURG
COUNTY OF POWHATAN

OLIVER A. POLLARD, JR.
JUDGE'S CHAMBERS
PETERSBURG, VIRGINIA

February 11, 1981

Gerald T. Zerkin, Esquire
1001 W. Brookland Park Boulevard
Richmond, Virginia 23220

Thomas D. Bagwell, Esquire
Office of the Attorney General
900 Fidelity Building
Richmond, Virginia 23219

Re: Leroy Smith
v.
Edward C. Morris, Warden

Gentlemen:

This case is before the Court on facts stipulated by the parties and memorandums of counsel. The facts related in the stipulation are simple and need not be repeated.

I am of the opinion that petitioner is entitled to good time earned since July 1, 1977, the effective date of the amendment to §53-213 allowing good time for crimes committed during incarceration. This conclusion is consistent with the Attorney General's position taken in his letter of October 9, 1979, to Pleasant C. Shields; the Court's conclusion that prohibition of good time credit was not part of the Court's sentence of November 18, 1976; and what seems to be the administrative nature of §53-213.

Mr. Zerkin will kindly submit the order properly endorsed.

Very truly yours,

Thomas V. Warren
Judge

TVW/mm

VIRGINIA:

IN THE CIRCUIT COURT OF POWHATAN COUNTY

LEROY SMITH, JR.	)	
Petitioner	)	
v.	)	SUPPLEMENTAL STIPULATIONS
EDWARD C. MORRIS,	)	
Respondent	)	

Petitioner and respondent, by counsel, stipulate to the following facts:

1. Without receiving any good time credit on the sentences imposed by this court, petitioner would presently be eligible for release on mandatory parole.

2. Petitioner has not yet served a ninety day jail sentence imposed by the General District Court of the City of Richmond, which petitioner would commence to serve on February 18, 1981 at the Virginia State Penitentiary, where he is presently incarcerated.

3. If he is given good time credit on the sentences imposed by this court, petitioner is eligible for immediate release from custody.

Leroy Smith, Jr.

By _____
Counsel

Edward C. Morris

By _____
Counsel

D 2-19-81

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF POWHATAN

LEROY SMITH, JR.,

Petitioner,

v.

EDWARD C. MORRIS,

Respondent.

ORDER

This 19 day of February, 1981, came petitioner and respondent, by counsel, upon petitioner's request for the issuance of a writ of habeas corpus. Upon consideration of the pleadings and stipulations of the parties, which stipulations are hereby adopted as findings of fact, and the memoranda submitted to the court, and for the reasons stated in the Court's letter of February 11, 1981, it appearing that petitioner is entitled under the provisions of Virginia Code § 53-213 to good time credit on the sentences imposed by this Court and that petitioner has therefore served in their entirety all sentences heretofore imposed on him in the Commonwealth of Virginia, it is ADJUDGED and ORDERED that the writ of habeas corpus be granted and that James P. Mitchell, Warden of the Virginia State Penitentiary, to whose custody petitioner is presently committed, release petitioner from his custody forthwith.

It is further ORDERED that a copy of this Order be certified to the petitioner, respondent, James P. Mitchell, Gerald T. Zerkin, Esquire, and Thomas Bagwell, Esquire.

ENTER: 2-19-81

Thomas H. Jones
Judge

I ask for this: