NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 31, 2023

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RE: *Commonwealth of Virginia v. Jason Keith Walker*
Case No. FE-2014-135

Dear Counsel:

The Court has before it the question whether a jail sentence imposed in revocation of a suspended penitentiary sentence was modifiable under Virginia Code § 19.2-303 at

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any time while it remained unserved. The Commonwealth contends unserved jail sentences, namely, those stated as being no longer than twelve months, are only modifiable at any time if imposed at conviction, as opposed to in revocation of suspended sentences. The Defendant responds that the Court has the authority to modify any imposed jail sentence as long as the punishment remains unserved. The Defendant alternatively asserts that, even if this is not the case, the Court's January 12, 2022 Order modifying his jail sentence was at most voidable, meaning the Commonwealth's challenge is untimely.

The Court finds that Virginia Code § 19.2-303 does not empower the Court to modify an unserved jail sentence imposed in revocation of a suspended sentence. While the Court still possessed subject matter jurisdiction over the matter, the Court lacked active jurisdiction to modify the Defendant's jail sentence under § 19.2-303. Although this would ordinarily result in an order being merely voidable, the Court entered the January 12, 2022 Order without a statutory exception to Virginia Supreme Court Rule 1:1 that would exempt the July 31, 2019 Order from finality. Therefore, the Court did not enter the January 12, 2022 Order through a mode of procedure the Court could lawfully adopt. Thus, the Order was void ab initio, and the Commonwealth's motion to vacate is a proper challenge to the Order's validity.

Accordingly, the Court must vacate the January 12, 2022 Order.

BACKGROUND

On August 19, 2014, a prior judge of the Fairfax Circuit Court convicted Jason Keith Walker ("Walker" or "Defendant") of two counts of statutory burglary and one count

of credit card theft. On December 17, 2014, the judge sentenced Walker to "incarceration with the Virginia Department of Corrections" for five years on each count, running concurrently, but suspended three years and six months of each sentence, conditioned upon Walker's completion of supervised probation for two years after his release. In March 2017, a second former judge found Walker in violation of probation, revoked the suspension of the 2014 sentence, sentenced Walker to four months in jail, and extended his probation for one year. On July 31, 2019, the same judge again found Walker in violation of his probation, partly revoked the suspension of Walker's previous sentence pursuant to Virginia Code § 19.2-306, terminated Walker's probation, ordered he "serve twelve (12) months in jail," and ordered him to "complete the Community Corrections Alternative Program."

On January 7, 2022, Walker appeared before the undersigned judge to ask the Court to modify the sentence imposed in the July 31, 2019 Order by having it run concurrently with Walker's sentence in CR-18-224, an Arlington County Circuit Court case. During the hearing, Walker argued that, although he had served time in the penitentiary since his 2014 sentence, the Court could modify the twelve-month jail sentence imposed by the July 31, 2019 Order because it remained unserved. On January 12, 2022, this Court entered an Order modifying the sentence imposed on July 31, 2019 to run concurrently with Walker's Arlington County sentence. The Court found it had jurisdiction under Virginia Code § 19.2-303 because the July 31, 2019 Order imposed a jail sentence Walker had not served. The Court timely advised the Virginia Department of

Corrections of the change in Walker's sentence. The Commonwealth did not appeal the Order.

On November 7, 2022, the Commonwealth filed a motion to vacate this Court's January 12, 2022 Order. The Court heard both parties' arguments on January 26, 2023, and took the matter under advisement.

ANALYSIS

This matter comes before the Court on the Commonwealth's assertion that the Court lacked jurisdiction to enter the January 12, 2022 Order because Virginia Code § 19.2-303, which allows the court to modify an unserved jail sentence at any time, does not apply to sentences imposed in probation revocation proceedings. Thus, the Court must revisit whether the plain language of § 19.2-303 allowed the Court to modify the jail term imposed on Walker. If the Court erred, it must determine whether the error renders the January 12, 2022 Order void ab initio or voidable and whether the Commonwealth's motion to vacate is a proper challenge to the Order.

I. The Phrase "Upon Conviction" in Virginia Code § 19.2-303 Limits the Terms "Sentence" and "Sentenced" to the Jail Time Imposed at the Original Sentencing Event

Virginia Code § 19.2-303 states the following in relevant part:

> If a person is *sentenced to jail upon conviction* of a misdemeanor or a felony, the court may, *at any time before the sentence has been completely served*, suspend the unserved portion of *any such sentence*, place the person on probation in accordance with the provisions of this section, or otherwise modify the sentence imposed.
>
> If a person has been sentenced for a felony to the Department of Corrections (the Department), the court that heard the case, if it appears compatible with the public interest and there are circumstances in mitigation

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> of the offense, may, at any time before the person is transferred to the Department, or within 60 days of such transfer, suspend or otherwise modify the unserved portion of such a sentence. The court may place the person on probation in accordance with the provisions of this section.

Va. Code § 19.2-303 (emphasis added). The statute contemplates two distinct avenues for modification of a previously imposed sentence. Under the first subsection, the court may modify a jail sentence at any time before the defendant completely serves the sentence. *Id.* The second subsection limits the court's authority to modify a penitentiary sentence to sixty days after a defendant's transfer to the Virginia Department of Corrections. *Id.*

When reading both provisions together, the Commonwealth asserts the Court may not modify a jail sentence imposed at a probation revocation proceeding. The Commonwealth does not question the Court's authority to impose a jail sentence in such a setting but maintains that the jail term is not later subject to modification "at any time." The Commonwealth views this Court's jurisdiction to modify an unserved jail sentence as permissible only if the jail term was imposed in the original sentencing event. Therefore, the Court must address whether § 19.2-303 allows for modification of a jail sentence imposed at a probation revocation hearing rather than being limited to only jail terms imposed at the initial sentencing.

When analyzing a statute, "[c]ourts 'are required to ascertain and give effect to the intention of the legislature, which is usually self-evident from the statutory language.'" *Tanner v. Commonwealth*, 72 Va. App. 86, 98-99 (2020) (quoting *Armstead v. Commonwealth*, 55 Va. App. 354, 360 (2009)). Consequently, this Court must "apply the plain language of [the] statute unless the terms are ambiguous . . . or applying the plain

language would lead to an absurd result." *Boynton v. Kilgore*, 271 Va. 220, 227 (2006). In doing so, courts must presume "the General Assembly chose, with care, the words it used in enacting the statute." *Henthorne v. Commonwealth*, 76 Va. App. 60, 66 (2022) (quoting *Jordan v. Commonwealth*, 295 Va. 70, 75 (2018)). Thus, "[i]f the legislature's intent is discernable from the plain meaning of the words in the statute, [courts may] look no further." *Street v. Commonwealth*, 75 Va. App. 298, 306 (2022).

A court must "examine a statute in its entirety, rather than by isolating particular words or phrases." *Schwartz v. Commonwealth*, 45 Va. App. 407, 450 (2005) (quoting *Cummings v. Fulghum*, 261 Va. 73, 77 (2001)). "When bound by the plain meaning of the language used," courts may not "'add or subtract from the words used in the statute.'" *Nicholson v. Commonwealth*, 56 Va. App. 491, 503 (2010) (quoting *Posey v. Commonwealth*, 123 Va. 551, 553 (1918)). Indeed, "[w]hen the General Assembly includes specific language in one statute, but omits that language from another statute, courts must presume that the exclusion of the language was intentional . . . [and] the omission of such language in another statute represents an unambiguous manifestation of a contrary intention." *Brown v. Commonwealth*, 284 Va. 538, 545 (2012) (citing *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 654 (2004)) (alteration omitted).

The Commonwealth avers that the terms "sentence" and "sentenced" in § 19.2-303 refer only to penalties exacted at the original sentencing event and that punishment imposed at a probation revocation hearing is not a "sentence." However, an alternative reading of § 19.2-303, suggested by the statutory scheme and precedent, calls the Commonwealth's position into question. For example, the Supreme Court of Virginia has delineated that "Code § 19.2-306 defines the *sentencing* authority of a trial

court which has found a probationary violation." *Smith v. Commonwealth,* 222 Va. 700, 702 (1981) (emphasis added). Furthermore, Virginia Code § 19.2-306 states, in part, that "[i]f the court . . . finds . . . that the defendant has violated the terms of suspension, then the court may revoke the suspension and *impose a sentence* in accordance with the provisions of § 19.2-306.1." Va. Code § 19.2-306(C) (emphasis added). Hence, the Court has the authority to impose a sentence at a revocation proceeding. To conclude "sentence" and "sentenced" in § 19.2-303 do not encompass the imposition of a "sentence" under § 19.2-306 would create "functional inconsistencies" between the two statutes. *See Cuccinelli v. Rector & Visitors of the Univ. of Virginia*, 283 Va. 420, 430 (2012); *see also Virginia Elec. & Power Co. v. Bd. of Cnty. Supervisors*, 226 Va. 382, 387-88 (1983) (stating courts must interpret statutes "as a consistent and harmonious whole so as to effectuate the legislative goal").

Despite the punishment imposed in a probation revocation setting appearing to be a "sentence," courts have distinguished the "sentence" imposed in a probation revocation from an original sentence. *See, e.g., Canty v. Commonwealth*, 57 Va. App. 171, 179 n.9 (2010) ("Although we have referred to the revocation and resuspension as a 'new sentencing *event*,' we did so in the context of recognizing the trial court's power to place new conditions on resuspensions. . . . The revocation and resuspension is a new sentencing *event* but it is not a new *sentence*."). The General Assembly is presumed to be aware of the definitions utilized by courts when analyzing statutes. *Newberry Station Homeowners Ass'n, Inc. v. Bd. of Supervisors*, 285 Va. 604, 615 n.4 (2013); *Barson v. Commonwealth*, 284 Va. 67, 74 (2012). Courts deem the General Assembly's acquiescence as approval of those interpretations. *Barson*, 284 Va. at 74. Accordingly,

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the use of "sentence" and "sentenced" within § 19.2-303 does not conclusively delineate whether the General Assembly intended those terms to exclude probation revocation proceedings.

However, the references to sentencing are qualified within § 19.2-303, and this Court must "examine [the] statute in its entirety, rather than . . . isolate[] particular words or phrases." *Schwartz*, 45 Va. App. at 450 (quoting *Cummings*, 261 Va. at 77). The statute states the court may modify the unserved portion of a sentence at any time "[i]f a person is sentenced to jail *upon conviction of a misdemeanor or a felony*." § 19.2-303 (emphasis added). At least one Virginia court has noted that "upon" is functionally equivalent to "on." *Jae W. Chung v. Chungsu Kim, et al.*, CL-2022-1955, at 4 n.4 (Va. Cir. Ct. June 28, 2023) ("The different terms within paragraphs A and D of the statute, 'fraud on the court' and 'fraud upon the court,' are a distinction without a difference. . . . [H]ere the words 'on' and 'upon' have the same meaning. The word 'upon' is merely a formal preposition for the word 'on.' It has no other meaning."). The word "on" has been defined as "indicat[ing] a time frame during which something takes place . . . or an instant, action, or occurrence when something begins or is done." *On*, Merriam-Webster, https://www.merriam-webster.com/dictionary/on (last visited July 25, 2023). Consequently, "upon" limits the statute to a sentence imposed at or near the same time as a conviction.

In *Lewis v. Commonwealth,* the Supreme Court of Virginia discussed the definition of conviction, stating "we held that 'the word "convicted" . . . means convicted by judgment, and requires a judgment of conviction, in addition to the verdict of the jury.'" 295 Va. 454, 463 (2018) (quoting *Smith v. Commonwealth*, 134 Va. 589, 592 (1922))

(emphasis omitted). "The same principle applies when a defendant pleads guilty or is tried by the court without a jury." *Id.* The imposition of a sentence at a subsequent sentencing event is not "part of the rendition of a judgment of conviction." *Id.* at 465. It follows that the modifiable jail sentence referenced in Virginia Code § 19.2-303 is one imposed during the time frame in which a court enters a judgment of conviction for a misdemeanor or felony.

Thus, the General Assembly's usage of "upon conviction of a misdemeanor or a felony" limits "sentence" and "sentencing" to the original sentencing event. *See* § 19.2-303. This interpretation is cemented by the omission of "upon conviction" from the subsequent subsection, which specifies the Court's authority to modify a penitentiary sentence. *See id.* Thus, the Court must treat this omission as "an unambiguous manifestation" of the General Assembly's intent that "upon conviction" in § 19.2-303 limits the Court's ability to modify unserved jail sentences "at any time" to those imposed in an original sentencing event, thereby excluding those imposed during probation revocation proceedings.[1] *See Brown*, 284 Va. at 545. While the Court is unaware of any public policy reason for this distinction, courts "can only administer the law as it is written." *Prease v. Clarke*, No. 220665, 2023 WL 4359509, at *5 (Va. July 6, 2023) (quoting *In re Woodley*, 290 Va. 482, 490 (2015)). This Court "may not extend the meaning of a statute 'simply because it may seem . . . that a similar policy applies, or

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[1] The Defendant also asked the Court to apply the rule of lenity in its interpretation of § 19.2-303 should the Court find the statutory language ambiguous. Section 19.2-303 could be subject to the rule of lenity "since it is a criminal procedure statute of the type 'generally . . . construed strictly against the Commonwealth.'" *See Commonwealth v. Burkard*, No. FE-2021-475, 2023 WL 2069610, at *13 (Va. Cir. Ct. Feb. 16, 2023) (quoting *Pierce v. Commonwealth*, 21 Va. App. 581, 584 (1996)). However, as the statute's plain language is clear, the rule is inapplicable in this cause. *See Fitzgerald v. Loudoun Cnty. Sheriff's Off.*, 289 Va. 499, 508 n.3 (2015) ("Only when a 'penal statute is unclear' do Virginia courts apply the rule of lenity and strictly construe the statute in the criminal defendant's favor.").

upon the speculation that if the legislature had thought of it, very likely broader words would have been used.'" *Id.* (quoting *In re Woodley*, 290 Va. at 490). For these reasons, the Court's reliance on § 19.2-303 to modify the Defendant's jail sentence in the present case was in error. Therefore, the Court must now consider whether the January 12, 2022 Order is voidable as the Defendant maintains, meaning it could only be challenged within twenty-one days after entry or by timely appeal, or void ab initio as the Commonwealth contends, allowing a challenge at any time.

II. The Court's Order Modifying the Defendant's Jail Sentence Was Void Ab Initio and, Therefore, the Commonwealth's Motion to Vacate Is a Proper Challenge to the Order

Because the Court's entry of the January 12, 2022 Order was in error, the Court must now consider whether the Order was void ab initio or voidable.[2] The Commonwealth asserts the Court lacked jurisdiction over the matter, rendering the Order void. The Defendant counters that the Order is merely voidable.[3] Thus, the Court must determine whether it had jurisdiction to enter the January 12, 2022 Order. A court "always has jurisdiction to determine whether it has . . . jurisdiction." *Pure Presbyterian Church of Wash. v. Grace of God Presbyterian Church*, 296 Va. 42, 50 (2018) (quoting *Morrison v. Bestler*, 239 Va. 166, 170 (1990)). Jurisdiction is "the power to adjudicate a case upon the merits and dispose of it as justice may require." *Id.* at 49 (quoting *Shelton v. Sydnor*,

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[2] A void judgment is a nullity and "may be challenged directly or collaterally 'by all persons, anywhere, at any time, or in any manner.'" *Hicks ex rel. Hicks v. Mellis*, 275 Va. 213, 219 (2008) (quoting *Collins v. Shepherd*, 274 Va. 390, 402 (2007)). When an order is voidable, the decision "may be set aside only (1) by motion to the trial court filed within twenty-one days of its entry, . . . (2) on direct appeal, . . . or (3) by bill of review." *Parrish v. Jessee*, 250 Va. 514, 521 (1995) (internal citations omitted).

[3] The Defendant argues that if the January 12, 2022 Order is only voidable, the Commonwealth's motion to vacate is untimely and, therefore, an improper challenge.

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126 Va. 625, 629 (1920)). To adjudicate a particular case, a court must have "active jurisdiction." *Id.* (citing *Farant Inv. Corp. v. Francis*, 138 Va. 417, 427-28 (1924)).

Active jurisdiction requires several elements, including subject matter jurisdiction, territorial jurisdiction,[4] notice jurisdiction,[5] and "the other conditions of fact . . . which are demanded by the . . . law as the prerequisites of the authority of the court to proceed to judgment or decree." *Id.* (quoting *Morrison*, 239 Va. at 169). All elements are necessary to ensure a valid judgment. *Id.* (citing *Morrison*, 239 Va. at 169). In this case, the Court's subject matter jurisdiction is the main element in dispute. As stated in *Humphreys v. Commonwealth*, "[j]urisdiction of the subject matter can only be acquired by virtue of the Constitution or of some statute." 186 Va. 765, 772 (1947). The Commonwealth asserts that no such statutory authority permits the Court to modify the Defendant's unserved jail sentence. The Commonwealth thus argues the Court lacked subject matter jurisdiction to enter the January 12, 2022 Order, and it was, consequently, void.

The Supreme Court of Virginia has stated that whether an order is void ab initio or voidable "'turns on the subtle, but crucial, distinction deeply embedded in Virginia law' between two very different but semantically similar concepts: subject matter jurisdiction and, for lack of a better expression, active jurisdiction." *Cilwa v. Commonwealth*, 298 Va. 259, 266 (2019) (quoting *Jones v. Commonwealth*, 293 Va. 29, 46 (2017)). Subject matter jurisdiction "refers to a court's power to adjudicate a class of cases or controversies." *In*

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[4] Courts have defined territorial jurisdiction as "authority over persons, things, or occurrences located in a defined geographic area." *Id.* (quoting *Morrison*, 239 Va. at 169).

[5] Courts have defined notice jurisdiction as "effective notice to a party." *Id.* (quoting *Morrison*, 239 Va. at 169).

re Commonwealth, 278 Va. 1, 11 (2009) (stating subject matter jurisdiction focuses on the "subject of the case," not the "particular proceeding"). In contrast to the other jurisdictional elements, "[s]ubject matter jurisdiction . . . cannot be waived or conferred on the court by agreement of the parties." *Morrison*, 239 Va. at 169-70. "If a court enters an order outside of its subject matter jurisdiction, the order can be set aside the day after its entry or a century later. In the eyes of the law, such an order is not merely an erroneous order — it is no order at all." *Cilwa*, 298 Va. at 266.

In contrast, active jurisdiction "requires a court with subject matter jurisdiction to adjudicate a case consistent with the law governing that adjudication." *Id.* at 266-67. The Supreme Court of Virginia has further held that "[d]efects in active jurisdiction can be waived . . . and even if not waived, such defects are not subject to collateral attack." *Id.* at 270-71 (internal citations omitted). "This distinction guards against the improper elevation of a court's failure 'to comply with the requirements for exercising its authority to the same level of gravity as a lack of subject matter jurisdiction.'" *Jones*, 293 Va. at 47 (quoting *Nelson v. Warden*, 262 Va. 276, 281 (2001)).

With the foregoing in mind, the *Cilwa* court stated the following:

> Code § 17.1-513 grants circuit courts "original and general jurisdiction" over "criminal" cases "in which an appeal may be had to the Supreme Court." A Virginia court's "jurisdiction to revoke a convict's probation and suspension of sentence is part of [the] criminal process." *Green v. Commonwealth*, 263 Va. 191, 194, 557 S.E.2d 230 (2002); *see Richardson v. Commonwealth*, 131 Va. 802, 807-08, 109 S.E. 460 (1921).
>
> Several procedural statutes govern the proper use of a court's authority following the imposition of a criminal sentence. A trial court has the authority to "suspend [the] imposition of sentence or suspend the sentence in whole or part." Code § 19.2-303. . . .

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> Even if the statute . . . contain[ed] [an] implied time limitation, violating it would not deprive a court of its subject matter jurisdiction over the case. Code §§ 19.2-304 and 19.2-306 govern the procedures for the trial court's *exercise* of authority over suspended sentences, probation, and revocation proceedings. Neither statute *grants* a trial court categorical judicial power over criminal cases or their attendant proceedings, and thus, neither can reasonably be read to strip a trial court of subject matter jurisdiction if the court violates those procedures. Unless a procedural statute clearly states otherwise, "[t]he validity of a judgment based upon a challenge to the application of [such] a statute raises a question of trial error, and not a question of [subject matter] jurisdiction," *Pure Presbyterian Church of Wash.*, 296 Va. at 56, 817 S.E.2d 547 (citation omitted).

298 Va. at 267-71 (footnote omitted). This opinion was echoed in *Hannah v. Commonwealth*, where the Court of Appeals of Virginia held that,

> Code §§ 19.2-303 through -306.1 "govern the *procedures* for the trial court's exercise of authority over suspended sentences, probation, and revocation proceedings" in individual cases. *Cilwa*, 298 Va. at 269 (emphasis added). Those statutes do not "grant[] a trial court categorical judicial power over criminal cases or their attendant proceedings, and thus, . . . [cannot] reasonably be read to strip a trial court of subject matter jurisdiction if the court violates those procedures." *Id.* Consequently, the 2021 amendments to those statutes merely place new limitations on a trial court's exercise of its "active" jurisdiction but do not strip it of subject matter jurisdiction over revocation proceedings generally.

No. 0700-22-1, 2023 WL 2761502, at *4 (Va. Ct. App. Apr. 4, 2023) (alterations and emphasis in original). In the instant case, this Court erred when it found it had active jurisdiction to modify the jail sentence previously imposed in revocation of a suspended penitentiary sentence "at any time before the sentence has been completely served." § 19.2-303. Nevertheless, while § 19.2-303 limits a trial court's exercise of its active jurisdiction by restricting the time a court may modify jail and penitentiary sentences, the statute does not strip courts of "categorical judicial power over criminal cases or their attendant proceedings." *Cilwa*, 298 Va. at 269. Because § 19.2-303 does not clearly state

that acting outside of its procedures will strip a court of subject matter jurisdiction, the misapplication of the statute raises only a question of active jurisdiction. *See id.* at 269-70; *Pure Presbyterian Church of Wash.*, 296 Va. at 56. Based solely upon this, the Court's January 12, 2022 Order would only be voidable. *See Hannah*, 2023 WL 2761502, at *3 ("[A]n order entered by a court having subject matter jurisdiction but lacking 'active jurisdiction' over a particular case is not void but *voidable*.").

However, exceptions exist to the general principle that defects in active jurisdiction are merely voidable. *Cilwa*, 298 Va. at 270-71 & n.7. These exceptions are recognized in "very limited categories of unlawful exercises of judicial authority that are 'so palpable that [they] can be considered void ab initio.'" *Id.* at 271 n.7 (alteration in original) (quoting *Cabral v. Cabral*, 62 Va. App. 600, 608 & n.3 (2013)). This exception is not derived from the court lacking subject matter jurisdiction but because "'the mode of procedure used by the court was one that the court could not lawfully adopt.'" *Cabral*, 62 Va. App. at 608 (quoting *Kelley v. Stamos*, 285 Va. 68, 75 (2013)). "While very few judicial orders deserve this disapprobation, a violation of Rule 1:1 is one of them." *Id.*; *see Burrell v. Commonwealth*, 283 Va. 474, 480 (2012).

The Commonwealth argues that if § 19.2-303 did not allow the Court to modify the previous sentencing order, the Court's January 12, 2022 Order fell outside the time constraints of Virginia Supreme Court Rule 1:1. Under Rule 1:1, "[a]ll final judgments, orders, and decrees . . . remain under the control of the trial court and may be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Va. Sup. Ct. R. 1:1(A). "In a criminal case, the final order is the sentencing order," *Johnson v.*

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Commonwealth, 72 Va. App. 587, 596 (2020), and the Court acknowledges the July 31, 2019 Order was final.[6] Thus, because the Court did not have authority to modify the Defendant's sentence under § 19.2-303, the Court must evaluate the January 12, 2022 Order in light of Rule 1:1's twenty-one-day restriction.[7]

In *Burrell v. Commonwealth*, the Supreme Court of Virginia found a circuit court erred when it ruled it had the authority to modify a sentencing order by reducing a felony charge to a misdemeanor under a previous version of § 19.2-303. 283 Va. at 480. Having established the circuit court did not retain jurisdiction to modify the sentencing order under § 19.2-303, the Supreme Court of Virginia found the modification violated Rule 1:1. *Id.* at 479. Accordingly, the Supreme Court held the sentencing order was void ab initio. *Id.* at 480. As this Court concludes it did not have the authority to modify the Defendant's jail sentence under § 19.2-303, the January 12, 2022 Order conflicts with Rule 1:1 because the Court entered the Order outside its twenty-one-day restriction. For these reasons, the Court finds the January 12, 2022 Order is void ab initio.

A void order "may be challenged directly or collaterally 'by all persons, anywhere, at any time, or in any manner.'" *Hicks*, 275 Va. at 219 (quoting *Collins*, 274 Va. at 402). Therefore, the Commonwealth's motion to vacate is a proper challenge to the January 12, 2022 Order, and the Court will grant the motion.

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[6] Courts have considered orders revoking suspended sentences based on probation violations to be final sentencing orders. *See, e.g.*, *Douglas v. Commonwealth*, No. 1886-15-3, 2017 WL 1149686, at *4 (Va. Ct. App. Mar. 28, 2017).

[7] Rule 1:1 does not impact the Court's analysis regarding subject matter jurisdiction. Though Rule 1:1 has been "sometimes called a limitation on 'subject matter jurisdiction,' . . . [it] serves only as a mandatory procedural precondition to the trial court's lawful exercise of its authority." *Cabral*, 62 Va. App. at 606-07 (quoting *Kelley*, 285 Va. at 79) (finding "[j]udicially created procedural rules cannot expand or contract the subject-matter jurisdiction of the courts").

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CONCLUSION

The Court has considered whether an unserved jail sentence imposed in revocation of a suspended sentence was subsequently modifiable at any time under Virginia Code § 19.2-303. The Court finds § 19.2-303 specifies the General Assembly's intent to allow modification only for a jail sentence imposed "upon conviction." While the Court possessed subject matter jurisdiction to modify the Defendant's jail sentence, the Court lacked active jurisdiction under § 19.2-303 to revise the prior sentencing order. Because of this, there was no statutory exception to Virginia Supreme Court Rule 1:1 that would exempt the July 31, 2019 Order from finality, and the Court therefore entered the January 12, 2022 Order through a procedure the Court could not lawfully adopt. As a result, the Order was void ab initio. Since litigants may attack void orders at any time, the Commonwealth's motion to vacate is a proper challenge to the Order's validity.

Consequently, the Court must vacate the January 12, 2022 Order, thereby restoring the sentence imposed in the July 31, 2019 Order.[8]

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[8] The Court notes the July 31, 2019 Order entered by a prior judge is deficient in invoking the CCAP sentencing authority provided by Virginia Code § 19.2-316.4. First, the Court terminated probation when the Defendant's entry into and successful completion of CCAP requires probation. Va. Code § 19.2-316.4(B)(3) ("[F]ollowing a finding that the defendant has violated the terms and conditions of his probation previously ordered, [the court] shall place the defendant on probation . . . . Such probation shall be conditioned upon the defendant's entry into and successful completion of the community corrections alternative program."). Second, the Order omitted the required statement that "upon successful completion of the program, the defendant shall be released from confinement and be under probation supervision for a period of not less than one year." *Id.* Third, by not setting a suspended term of penitentiary time, the Defendant's eligibility for CCAP is called into question, for the program applies if he is "[a] defendant . . . whose suspension of sentence would otherwise be revoked." *Id.* (B). As the impact of the July 31, 2019 Order's shortcomings was not raised for adjudication by the parties, the issue is left for their further scrutiny. Normally, when a court "did not have the *power* to render a judgment . . . . the ultra vires provision in the sentencing order results in the entire sentencing order being void ab initio." *See Burrell,* 283 Va. at 480 (emphasis added). The parties may contemplate, however, whether failure to express the CCAP sentencing term properly, which the court otherwise had the *power* to enter, would alternatively make the July 31, 2019 Order merely voidable. The Court further observes that to the extent the CCAP provision in the Order is inconsistent with statutory prerequisites for placement into the program, the Virginia Department of Corrections has "the final authority to determine an individual's eligibility and suitability for the program,"

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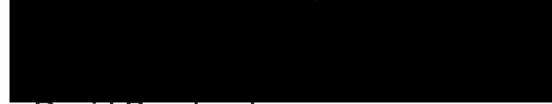
The Court shall issue a separate order incorporating the ruling herein, and until such time, this cause is not final.

Sincerely,



David Bernhard
Judge, Fairfax Circuit Court

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and may thus deem the Defendant ineligible, thereby excusing application of the CCAP sentencing term by operation of law. *Id.* (B)(2); *see* Va. Dep't of Corr. Operating Proc. 930.2, Community Corrections Alternative Program Referral Unit § II(A), at 4 (Mar. 1, 2021), available at https://vadoc.virginia.gov/files/operating-procedures/900/vadoc-op-930-2.pdf (requiring defendants be on supervised probation to be eligible for entry into CCAP).

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