SCV: Submitted on 03-22-2017 14:57:47 EDT for filing on 03-22-2017

IN THE

Supreme Court of Virginia

RECORD NO. 160688

ALPHONZO DORRELL GRAVES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Paul M. Wiley (VSB 89673)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-8893
(202) 637-5910 (Fax)
paul.wiley@hoganlovells.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Table of Authorities iii

Statement of the Case 1

Facts 1

Material Proceedings Below 4

Assignment of Error 5

Argument 5

1. Standard of Review 5

2. The only punishment permitted under Va. Code § 18.2-53.1 is a three-year sentence, no portion of which may be suspended. 6

   a. The plain language of § 18.2-53.1, read in conjunction with § 18.2-12.1, expressly permits only a three-year sentence for a first offense. 6

   b. If "minimum" is read separately from "mandatory minimum" in § 18.2-53.1, then the statute is inherently ambiguous because it departs from the ordinary sentencing scheme in Virginia. 9

   c. The legislative history of § 18.2-53.1 clearly reveals legislative intent to fix a set term of incarceration as the punishment. 13

3. The *Hines* holding has been proven correct, as both the General Assembly and executive officials have adopted its construction of § 18.2-53.1. 20

   a. The General Assembly has had five years since *Hines* to express its disagreement and amend § 18.2-53.1, and it has not done so. 21

b. Multiple executive agencies have also acquiesced to the holding in *Hines*. 23

4. Because § 18.2-53.1 only permits a three-year sentence for a first conviction, Mr. Graves's five-year sentence was excessive, rendering the entire sentencing order void ab initio, and he is entitled to a new sentencing hearing. 24

Conclusion 26

Certificate of Service 27

Appendix A 28

TABLE OF AUTHORITIES

CASES

Ansell v. Commonwealth, 219 Va. 759, 250 S.E.2d 760 (1979) 14, 19

Appalachian Power Co. v. State Corp. Comm'n, 284 Va. 695, 733 S.E.2d 250 (2012) 21

Beck v. Shelton, 267 Va. 482, 593 S.E.2d 195 (2004) 21, 22

Browning-Ferris, Inc. v. Commonwealth, 225 Va. 157, 300 S.E.2d 603 (1983) 22

Burrell v. Commonwealth, 283 Va. 474, 722 S.E.2d 272 (2012) 25

Chacey v. Garvey, 291 Va. 1, 781 S.E.2d 357 (2015) 5

Commonwealth v. Appalachian Elec. Power Co., 193 Va. 37, 68 S.E.2d 122 (1951) 21

Grafmuller v. Commonwealth, 290 Va. 525, 778 S.E.2d 114 (2015) 24

Hines v. Commonwealth, 59 Va. App. 567, 721 S.E.2d 792 (2012) ...*passim*

Howell v. McAuliffe, 292 Va. 320, 788 S.E.2d 706 (2016) 11

Marymount College of Va. v. Harris, 205 Va. 712, 139 S.E.2d 43 (1964) 13

McDaniel v. Commonwealth, 199 Va. 287, 99 S.E.2d 623 (1957) 13

Parrish v. Fed. Nat'l Mortg. Ass'n, 292 Va. 44, 787 S.E.2d 116 (2016) 6

Rawls v. Commonwealth, 278 Va. 213, 683 S.E.2d 544 (2009) 24, 25

Sandifer v. U.S. Steel Corp., 134 S. Ct. 870 (2014) 8

Shepherd v. F.J. Kress Box Co., 154 Va. 421, 153 S.E. 649 (1930) 13

Simon v. Forer, 265 Va. 483, 578 S.E.2d 792 (2003) 19

Smith Mtn. Lake Yacht Club, Inc. v. Ramaker, 261 Va. 240, 542 S.E.2d 392 (2001) 20

St. Joseph's Soc'y v. Va. Trust Co., 175 Va. 503, 9 S.E.2d 304 (1940) 22

Virginia Department of Corrections v. Surovell, 290 Va. 255, 776 S.E.2d 579 (2015) 22

STATUTES and RULES

Va. Code § 2.2-3704.01 22

Va. Code § 8.01-428(A) 4

Va. Code § 18.2-10 ..... 9, 10

Va. Code § 18.2-11 ..... 9, 10

Va. Code § 18.2-12.1 ..... 6, 7, 8, 9, 16

Va. Code § 18.2-14 ..... 3, 10

Va. Code § 18.2-32 1

Va. Code § 18.2-53.1 ..... passim

Va. Code § 18.2-61(B)(1) 19

Va. Code § 18.2-308.2 ..... 1, 5, 11, 12

Va. Code § 18.2-308.4 10

Va. Code § 33.2-802 10

Va. Code § 46.2-868 10

Va. Code § 46.2-1110 10

Va. Sup. Ct. R. 1:1 25

OTHER AUTHORITIES

1975 Va. Acts 19 14

1975 Va. Acts 1296, 1299-1300 14

1976 Va. Acts 430 14

1980 Va. Acts 385 15

1982 Va. Acts 1225 15

1991 Va. Acts 794 15

1992 Va. Acts 239, 1105-06 15

1993 Va. Acts 1207 15

1993 Va. Acts 693 15

1994 Va. Acts 1605 15

2004 Va. Acts 673-90 ..... 15, 16, 18

2016 Va. Acts Ch. 620 22

2016 Va. Acts Ch. 716 22

H.J. Res. 687, 2001 Gen. Assemb., Reg. Sess. (Va. 2001) 17, 18

Report of the Va. State Crime Commission, The Reorganization and Restructuring of Title 18.2, H. Doc. 15, 2004 Gen. Assemb., Reg. Sess. (Va. 2004) 17, 18

Statement of the Case

For more than forty years, the General Assembly has punished the use of a firearm in commission of certain felonies the same way: a fixed, mandatory term of imprisonment, no portion of which may be suspended. Appellant Alphonzo Graves was sentenced to more than what the statute allows. Instead of the three-year sentence permitted for a first offense, Mr. Graves received five years. By exceeding the punishment authorized by the Code, the sentencing judge rendered Mr. Graves's sentencing order void *ab initio*. That order should be vacated by the Court, and Mr. Graves should be permitted to stand for re-sentencing.

Facts

Mr. Graves's conviction and sentencing

Mr. Graves was indicted in 2005, by a grand jury in the Circuit Court of Danville (the "circuit court"), on three counts: possession of a firearm by a felon, a violation of Va. Code § 18.2-308.2 (Circuit Court No. 05-1448) ("Count 1"); first degree murder, a violation of Va. Code § 18.2-32 (Circuit Court No. 05-1502) ("Count 2"); and using a firearm in the commission of a felony, a violation of Va. Code § 18.2-53.1 (Circuit Court No. 05-1503)

("Count 3"). (JA 1–3.)[1] He pled guilty to Counts 2 and 3 on January 24, 2006. (JA 87–99, 140–145.) He pled guilty to Count 1 on July 6, 2007. (JA 100–09, 143–45.)

After a brief sentencing hearing on July 6, 2007, the circuit court sentenced Mr. Graves to five years' imprisonment with three years suspended on Count 1, and 60 years with 35 suspended on Count 2—both sentences within the permissible statutory range. (JA 4–6.) But on Count 3, despite the statute authorizing only a three-year sentence, Mr. Graves received five years with 2 suspended. (JA 4–6.) His total sentence on all three counts was 70 years, with an active combined sentence of 30 years. (JA 6.) The circuit court also imposed a 24-month period of supervised probation to begin upon Mr. Graves's release from prison. (JA 6.) Mr. Graves's guidelines sentence had a range of 23 years and 8 months, to 39 years and 5 months, with a midpoint of 31 years and 6 months. (SA 146–49.)

The Court of Appeals decides *Hines v. Commonwealth*

In February 2012, the Court of Appeals of Virginia handed down a decision in *Hines v. Commonwealth*, 59 Va. App. 567, 721 S.E.2d 792 (2012), holding "that the maximum sentence allowed under Code § 18.2-

[1] References to the Joint Appendix will be identified as "JA." References to the sealed portions of the Appendix will be identified as "SA."

53.1 is the mandatory term of either three years [for a first offense] or five years" for a second or subsequent offense. *Id.* at 570, 721 S.E.2d at 793. The Commonwealth conceded "that the *only* sentence available for a first conviction under Code § 18.2-53.1 is three years in prison, which cannot be suspended or run concurrently with any other sentence." *Id.* at 573, 721 S.E.2d at 795 (emphasis in original). The *Hines* court identified a potential ambiguity in § 18.2-53.1:

> [O]n one hand, it appears from the face of the statute that no statutory maximum exists and the trial court has the discretion to sentence a defendant to up to life imprisonment for a conviction of possession of a firearm in the commission of a felony. On the other hand, application of Code § 18.2-14 would seem to indicate that the trial court may impose only a three or five-year term of incarceration.

Id. at 575–76, 721 S.E.2d at 796. The court resolved the ambiguity by analyzing both the broader statutory context of § 18.2-53.1 and the legislative history behind its enactment and amendment. *Id.* at 576–80, 721 S.E.2d at 796–98. Then-Judge Kelsey dissented from the majority's ruling, arguing that no ambiguity existed because "the word 'minimum' means minimum." *Id.* at 582–93, 721 S.E.2d at 799–804 (Kelsey, J., dissenting).

Material Proceedings Below

After the Court of Appeals recognized that any sentence longer than three years for a first conviction under § 18.2-53.1 exceeded the terms of the statute, Mr. Graves filed a motion to vacate his sentence, pursuant to § 8.01-428(A), in the circuit court in January 2016. (JA 22–57.) As relevant to this appeal, Mr. Graves argued that his five-year sentence on Count 3 exceeded the punishment authorized by § 18.2-53.1, as the Court of Appeals had held in *Hines*. (JA 31–34.) Because the sentence was excessive, he argued that the sentence was void. (JA 31–34.) Mr. Graves requested that the circuit court vacate the void sentencing order and hold a new sentencing hearing. (JA 46.)

On February 10, 2016, the circuit court denied Mr. Graves's motion. (JA 59.) In a letter opinion accompanying the order denying the motion, the court explained that, despite the void sentencing order, the court "had both subject matter and personal jurisdiction when it originally ruled in this case," and that, as a consequence the "Motion to Vacate is without merit." (JA 60.) Mr. Graves moved the circuit court to reconsider. (JA 63–74.) The circuit court denied that motion as well. (JA 84.)

Mr. Graves timely noted an appeal to this Court on February 26, 2016. (JA 61–62.) While the appeal was pending, the Office of the

Commonwealth's Attorney for the City of Danville informed the Court by letter that it conceded "that on the conviction for use of a firearm in the commission of a felony, the trial court improperly sentenced" Mr. Graves. (JA 85.) After this Court granted Mr. Graves's appeal, Mr. Graves and the Commonwealth entered a joint motion to vacate the sentence on Count 3 and remand to the circuit court for resentencing. The Court denied that motion on March 14, 2017.

Assignment of Error[2]

II. The trial court erred when it imposed a sentence in excess of the statutory mandatory minimum.[3]

Argument

1. Standard of Review

The issues in this case present questions of statutory interpretation, which are questions of law the Court reviews *de novo*. *Chacey v. Garvey*, 291 Va. 1, 7–8, 781 S.E.2d 357, 359 (2015). The meaning of the statute

---

[2] The Court granted Mr. Graves's pro se appeal on assignments of error II and IV in his petition for appeal. Assignment of error IV argued that the circuit court abused its discretion by ordering Mr. Graves's sentences to run consecutively. Appellant now acknowledges that, by statute, any sentence on Count 3 would be required to run consecutively to the sentence on Count 2, and that the sentence on Count 1 must run consecutively to "any other sentence." Va. Code § 18.2-308.2(A). Having been duly advised by counsel, appellant no longer wishes to pursue the argument originally stated in assignment of error IV.

[3] Preserved for review at JA 31–34, 69–70.

further affects the lower court's jurisdiction, which is likewise a question of law reviewed *de novo*. *Parrish v. Fed. Nat'l Mortg. Ass'n*, 292 Va. 44, 49, 787 S.E.2d 116, 120 (2016).

2. The only punishment permitted under Va. Code § 18.2-53.1 is a three-year sentence, no portion of which may be suspended.

The Court need only apply the statutory definitions in Title 18.2 to see why § 18.2-53.1 permits just one punishment for a first offense, and just one punishment for a second or subsequent offense. The plain language of § 18.2-12.1 provides a statutory term of art that renders § 18.2-53.1 certain and conclusive. Only upon straining the language of the two statutes does one arrive at the conclusion that there is any ambiguity—but that ambiguity is just as quickly resolved in favor of the interpretation reached by the *Hines* court and favored by both parties here.

a. The plain language of § 18.2-53.1, read in conjunction with § 18.2-12.1, expressly permits only a three-year sentence for a first offense.

Va. Code § 18.2-53.1 reads today the same as it did in 2007, at the time of Mr. Graves's conviction:

> It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder [or other enumerated felonies]. **Violation of this section shall constitute a separate and distinct felony**

> **and any person found guilty thereof shall be sentenced to a mandatory minimum term of imprisonment of three years for a first conviction**, and to a mandatory minimum term of five years for a second or subsequent conviction under the provisions of this section. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.

Va. Code § 18.2-53.1 (emphasis added). "Mandatory minimum" is a statutory term of art, defined in § 18.2-12.1:

> "Mandatory minimum" wherever it appears in this Code means, for purposes of imposing punishment upon a person convicted of a crime, that the court shall impose the entire term of confinement, the full amount of the fine and the complete requirement of community service prescribed by law. The court shall not suspend in full or in part any punishment **described as** mandatory minimum punishment.

(Emphasis added.)

Properly read in this context, the phrase "mandatory minimum" is an adjective, modifying the punishment otherwise authorized by the statute defining the offense. The punishment authorized by § 18.2-53.1 for a first offense is a "term of imprisonment of three years." That three-year term is described as mandatory minimum punishment. As a consequence of being described as mandatory minimum punishment, the term of imprisonment of

three years cannot be suspended in whole or in part, and the sentencing court must "impose the entire term of confinement."

The dissent in *Hines* would have the statute read a different way, authorizing a minimum term of confinement of three years, which is also mandatory. *See Hines*, 59 Va. App. at 584, 721 S.E.2d at 800 (arguing for using the "common, ordinary, and accepted understanding of the word 'minimum'") (Kelsey, J., dissenting). But this reading puts too much emphasis on the word "minimum," standing alone, and overlooks "mandatory minimum" being a statutory term of art. Had the General Assembly intended the meaning ascribed to § 18.2-53.1 by the *Hines* dissent, the legislature easily could have made such meaning clear through the use of either a comma ("mandatory, minimum term of imprisonment") or the word "and" ("mandatory and minimum term of imprisonment").

Were it not for the existence of § 18.2-12.1, the phrase "mandatory minimum" in § 18.2-53.1 could be understood through the lens of the words' general, ordinary meaning. But a statutory definition supersedes interpreting words merely by looking to their common usage. *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) ("It is a fundamental canon that, **unless otherwise defined,** words will be interpreted as taking their ordinary, contemporary, common meaning."

(emphasis added) (quotations and citations omitted)). The definition of "mandatory minimum" in § 18.2-12.1 must be read as one phrase with a precise meaning. Bringing that meaning into § 18.2-53.1 reveals a construction in line with what the *Hines* majority ruled and what both parties maintain is the correct interpretation: a fixed, three-year term of imprisonment for a first offense, no portion of which can be suspended.

b. If "minimum" is read separately from "mandatory minimum" in § 18.2-53.1, then the statute is inherently ambiguous because it departs from the ordinary sentencing scheme in Virginia.

If the Court were to disagree, and read "minimum" without regard to the statutory definition in § 18.2-12.1, then § 18.2-53.1 becomes ambiguous because it would be in disharmony with the rest of Virginia's criminal law. It would become the only criminal statute in the Commonwealth expressly providing for a minimum punishment, but with no maximum punishment apparent from the language of the statute.

Ordinarily, Virginia law sets out a range of permissible punishments for a given offense by classification among a group of offenses. *See* Va. Code § 18.2-10 (classifying felonies among six classes, each with a set range of fines and terms of incarceration); § 18.2-11 (same, for misdemeanors). For offenses that are not otherwise classified, the permissible punishments are set out within the language of the specific

statute defining the offense. Va. Code § 18.2-14 (providing that offenses "for which punishment is prescribed without specification as to the class of offense, shall be punished according to the punishment prescribed in the section or sections thus defining the offense"). Either by classification under §§ 18.2-10 and 18.2-11 or by the terms in the Code sections "defining the offense," every criminal offense in the Commonwealth carries with it a maximum sentence that is discernible from plain statutory text.

But if the Court cleaves the phrase "mandatory minimum," and views each word separately from the other, it would turn § 18.2-53.1 into a singular oddity. Section 18.2-53.1 is one of 42 statutes in the Code to impose a mandatory minimum fine, period of incarceration, or both. *See Hines*, 59 Va. App. at 583 n.8, 721 S.E.2d at 799 n.8 (Kelsey, J., dissenting) (collecting statutes); *see also* Va. Code §§ 18.2-308.4, 33.2-802, 46.2-868, 46.2-1110. Every single one of the other 41 either places the offense in a class under § 18.2-10 or § 18.2-11, or specifically authorizes a maximum punishment. Section 18.2-53.1 does not. If § 18.2-53.1 has only a minimum sentence that is mandatory—as opposed to a "minimum mandatory" sentence—then it alone would provide for a minimum punishment with no corresponding maximum.

This result, while purportedly aiming for fealty to the "ordinary meaning" of the word "minimum," actually strains the statutory language beyond recognition. Even as the dissent in *Hines* acknowledged, "[a] minimum implies a maximum. Both words logically presuppose a range of options starting with one and ending with the other." *Hines*, 59 Va. App. at 583, 721 S.E.2d at 799–800 (Kelsey, J., dissenting). Other jurisdictions may have statutory schemes that only impose a minimum punishment without an accompanying maximum. *Id*. at 584–86, 721 S.E.2d at 800–01. But simply put, that is not how sentencing works in Virginia. The Court normally avoids importing concepts from other jurisdictions when the Commonwealth's law suffices on its own. *See, e.g.*, *Howell v. McAuliffe*, 292 Va. 320, 331–32, 788 S.E.2d 706, 712–13 (2016) (rejecting "a battery of federal citations" and analyzing the issue under Virginia precedent).

Contrast the language of § 18.2-53.1 with another Code provision under which Mr. Graves is currently serving a term of incarceration: § 18.2-308.2, possession of a firearm by a convicted felon. Like § 18.2-53.1, § 18.2-308.2 has provisions imposing two different mandatory minimum punishments. If the predicate felony was a violent felony, then the mandatory minimum punishment is a five-year term of imprisonment; if the predicate felony was not a violent felony, but occurred within the prior ten

years, then the mandatory minimum punishment is two years' imprisonment. But where § 18.2-308.2 differs most from § 18.2-53.1 is that any conviction under § 18.2-308.2 is punished as a Class 6 felony, carrying a maximum penalty of five years in prison. The mandatory minimum punishment provisions operate akin to aggravating factors—upon the satisfaction of one factual condition or another, the bottom end of punishments for Class 6 felonies (any prison term between one and two years) becomes unavailable, and portions of the general sentence that could otherwise be suspended become mandatory minimum punishments instead.

Section 18.2-308.2 is a fully formed, inclusive sentencing scheme. It references other provisions of the criminal code and incorporates punishments as defined elsewhere. There is no reason to look beyond the language of § 18.2-308.2 because the General Assembly has provided for both minimum and maximum punishments. Section 18.2-53.1, on the other hand, would be incomplete and ambiguous. Because § 18.2-53.1 would expressly provide for a minimum, but not expressly provide for a maximum, it would stand as the lone aberration from Virginia's otherwise consistent statutory sentencing regime.

When this Court construes statutes, it looks to all parts of a statutory scheme "so as to make it as harmonious as possible." *McDaniel v. Commonwealth*, 199 Va. 287, 292, 99 S.E.2d 623, 627–28 (1957).

> In the construction of its provisions, it is to be remembered that the Code itself is a single act of the Legislature. The different sections should be regarded, not as prior and subsequent acts, but as simultaneous expressions of the legislative will. All provisions there appearing which deal with the same subject should be construed together and reconciled whenever possible.

Marymount College of Va. v. Harris, 205 Va. 712, 717, 139 S.E.2d 43, 47 (1964) (quoting *Shepherd v. F.J. Kress Box Co.*, 154 Va. 421, 425–26, 153 S.E. 649, 650 (1930) (internal quotations and alterations omitted)). Viewed in concert with other sections of Title 18.2—both the sections dealing with classifications of punishment generally, and the sections containing "mandatory minimum" specifically—the absence of a maximum punishment in § 18.2-53.1 would render the statute inherently ambiguous.

c. The legislative history of § 18.2-53.1 clearly reveals legislative intent to fix a set term of incarceration as the punishment.

But that ambiguity is quickly resolved by reference to how the current version of § 18.2-53.1 came into force: since 1976, the General Assembly has punished the use of a firearm under § 18.2-53.1 with a fixed term of incarceration, no portion of which may be suspended.

- When § 18.2-53.1 was enacted in 1975, a first offense was a Class 6 felony, and a second or subsequent offense was a Class 5 felony. 1975 Va. Acts 1296, 1299–1300. These classifications carried with them the same range of prison terms that they do today. *See* 1975 Va. Acts 19 (providing for one to five years for a Class 6 felony, and one to ten for a Class 5).
- The General Assembly took out the Class 6 and Class 5 language in 1976, replacing it with fixed terms of incarceration: 1 year for a first offense and 3 years for a second or subsequent. 1976 Va. Acts 430. The amendment also added that "the sentence prescribed for a violation of the provisions of this section shall not be suspended in whole or in part." *Id.*
- Shortly after the 1976 amendments, this Court recognized the fixed nature of sentences under § 18.2-53.1. In *Ansell v. Commonwealth*, 219 Va. 759, 250 S.E.2d 760 (1979), the Court correctly read the 1976 amendment as replacing "the wide range of discretionary penalties originally authorized" with "[i]nflexible penalties" of specific length. *Id.* at 763, 250 S.E.2d at 762.

- Amendments through the 1980s and 1990s added predicate felonies to the enumerated list. 1980 Va. Acts 385 (adding malicious wounding); 1991 Va. Acts 794 (adding forcible sodomy and inanimate object sexual penetration); 1992 Va. Acts 239, 1105–06 (adding subsets of malicious wounding); 1993 Va. Acts 693 (adding animate object sexual penetration); 1994 Va. Acts 1605 (adding carjacking).
- The penalties were increased in 1982 and 1993—but were never changed from their fundamental character of being fixed terms of incarceration. 1982 Va. Acts 1225 (increasing the penalties to two years for a first offense and four years for a second or subsequent); 1993 Va. Acts 1207 (increasing the penalties to three and five years, respectively).

<u>The 2004 Amendments</u>

The change that could render § 18.2-53.1 ambiguous occurred in 2004. 2004 Va. Acts 673–90. Prior to then, the Code provided for mandatory minimum punishments in a piecemeal fashion: some statutes referred to the punishment as a mandatory minimum; others as a "minimum, mandatory sentence;" still others as a "mandatory, minimum sentence." *Id.* at 674, 685. The General Assembly attempted to clean up

the Code by adding the universal definition of "mandatory minimum" in § 18.2-12.1. *Id.* at 674.

The General Assembly then went through the various Code sections and replaced the piecemeal descriptions with reference to the new, universal definition in § 18.2-12.1. *See, e.g.*, 2004 Va. Acts at 674 (maintaining a 5-to-30-year sentencing range for malicious wounding, including "a mandatory minimum term of imprisonment of two years").[4] The only other changes in the statute were typographic: changing any numerical reference from letters to digits, and recognizing that a federal agency had changed names. *See, e.g.*, 2004 Va. Acts at 679 (changing "eighteen" to "18," "ten" to "10," and "fifty" to "50"); *id.* at 681–82 (changing "Immigration and Naturalization Service" to "United States Citizenship and Immigration Services"). Not a single amendment under the 2004 act changed the length or type of punishment imposed under the statutes being revised.

Just as with the 25 other statutes amended at the same time, the 2004 amendments were not a substantive change to § 18.2-53.1 because nothing about the 2004 amendments changed the character of the

[4] The General Assembly removing the "minimum, mandatory" and "mandatory, minimum" formulations in 2004 further refutes the argument that the two words can be considered independently and not as the term of art defined in § 18.2-12.1.

punishment authorized by § 18.2-53.1. Just as before, the two options provided under the statute were either a 3-year fixed term for a first offense or a 5-year fixed term for anything beyond a first offense. Just as before, no portion of either option could be suspended. Nothing in the 2004 amendment to § 18.2-53.1 changed the length or type of punishment.

The 2004 Crime Commission Report

The legislative history behind the language of the 2004 amendments further reinforces the conclusion that the amendments were intended to be stylistic and not substantive. The 2004 amendments were enacted as part of a package of revisions to Title 18.2 suggested by the Virginia State Crime Commission at the direction of the General Assembly. *See* H.J. Res. 687, 2001 Gen. Assemb., Reg. Sess. (Va. 2001) ("Joint Resolution") (directing the State Crime Commission "to study the organization of and inconsistencies in Title 18.2 of the Code"); Report of the Va. State Crime Commission, The Reorganization and Restructuring of Title 18.2, H. Doc. 15, 2004 Gen. Assemb., Reg. Sess. (Va. 2004) ("Crime Commission Report"). The Crime Commission identified "inconsistent language for the concept of a mandatory minimum punishment" throughout Title 18.2. Crime Commission Report at 37. The Commission recommended "amendments throughout the Virginia Code to use consistent language

when describing mandatory minimum criminal sentences," and identified statutes where the inconsistent language was to be "conformed" to the new definition. *Id.* The General Assembly then adopted verbatim the Commission's recommended definition of "mandatory minimum," and added § 18.2-53.1 to the Commission's list of statutes to amend with conforming language. *Compare* Crime Commission Report at 37–38, *with* 2004 Va. Acts 673–90.

These purely stylistic, "conforming" amendments stand in stark contrast to the substantive changes recommended elsewhere in the Crime Commission Report. More than 25 pages of the Crime Commission Report are devoted to analyzing sentence lengths and the propriety of aggravating factors in different circumstances. *See* Crime Commission Report at 9–36. This analysis was part of the Commission's mandate from the legislature to study "the level and extent of penalties" in the Code, to "review the proportionality of the criminal penalties," and to "make recommendations for necessary amendments." Joint Resolution, *supra*. The Commission recommended changing the penalty structure for more than half a dozen crimes. Crime Commission Report at 33–36. Notably absent from the recommended changes? Section 18.2-53.1.

If the legislative intent behind the 2004 amendment to § 18.2-53.1 was at all uncertain from the face of the changes themselves, the Crime Commission Report makes it clear as day. The General Assembly did nothing more than clean up inconsistent language and conform old substance to a new style. This conclusion is further reinforced by the fact that, at the same time the legislature made stylistic changes, it had received recommendations for substantive changes to criminal penalty structures throughout Title 18.2. And yet no change made to § 18.2-53.1 did anything to amend the length or type of punishment it authorized—the same "inflexible penalties" identified in *Ansell* nearly thirty years before.

The dissent in *Hines* took the position that the language of § 18.2-53.1, read in isolation, could be construed to permit the discretionary imposition of a life sentence for a first offense, of which only three years is mandatory and cannot be suspended. 57 Va. App. at 584–86, 721 S.E.2d at 800–01. But if the General Assembly wished to authorize a life sentence for a crime, it certainly knows how to do so. *See, e.g.*, Va. Code § 18.2-61(B)(1) (authorizing a maximum sentence of life, while also imposing 25 years as a mandatory minimum punishment). Just as the Court presumes the "legislature chose, with care, the words it used," *Simon v. Forer*, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003), the Court must presume the

legislature's omission of words used elsewhere was intentional. *Smith Mtn. Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001). The General Assembly did not expressly authorize the draconian sanction of life imprisonment for a violation of § 18.2-53.1. The statutory history shows that the General Assembly has never authorized a life sentence for violating § 18.2-53.1. The Court may not now interpret such an authorization into the Code. Instead, the Court should give effect to the General Assembly's intent by maintaining the punishment that the legislature established more than forty years ago—and consistently provided for ever since.

3. The *Hines* holding has been proven correct, as both the General Assembly and executive officials have adopted its construction of § 18.2-53.1.

Since 2012, numerous arms of the Commonwealth have had opportunities to confront the *Hines* decision and challenge the Court of Appeals' holding. None of them have seized that opportunity. Inarguably, this Court has the final say on interpreting the laws of the Commonwealth, and positions taken by other officials cannot divest the Court of its authority to determine what the law is. But when those officials' positions are consistent and repeated, they should be taken by this Court as persuasive evidence of the correct interpretive outcome.

a. The General Assembly has had five years since *Hines* to express its disagreement and amend § 18.2-53.1, and it has not done so.

The clearest indication that the *Hines* court's holding was correct is the General Assembly's failure to address any purported errors in the Court of Appeals' ruling. The *Hines* opinion came down in February 2012. *Hines*, 59 Va. App. at 567, 721 S.E.2d at 792. There have now been five regular sessions of the General Assembly and three special sessions since the *Hines* opinion, beginning with the 2013 regular session. Across all of those sessions, there have been twenty-five bills introduced that mention § 18.2-53.1.[5] Not a single one sought to amend § 18.2-53.1 to authorize a different sentence structure than what the *Hines* court held.

The General Assembly is presumed to be aware of how its statutes are being construed. *Commonwealth v. Appalachian Elec. Power Co.*, 193 Va. 37, 45–46, 68 S.E.2d 122, 127 (1951). The legislature's "failure to make corrective amendments evinces legislative acquiescence" to that construction. *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 703–05, 733 S.E.2d 250, 254–55 (2012) (discussing statutory interpretations from the State Corporation Commission); *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004) (discussing Attorney

[5] The full list of bills proposed is appended to this brief as Appendix A.

General's Opinions, and quoting *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161–62, 300 S.E.2d 603, 605–06 (1983)). This Court has twice ruled that five years was plenty of time for the General Assembly to change how a statute was being construed, so as to give effect to the established construction when the General Assembly did not act. *See Beck*, 267 Va. at 492, 593 S.E.2d at 200; *St. Joseph's Soc'y v. Va. Trust Co.*, 175 Va. 503, 511, 9 S.E.2d 304, 308 (1940) ("Since the opinion was handed down, there have been five sessions of the General Assembly, and [the statute in question] remains as it was when the opinion was announced.").

This is not a concept of a bygone era. The General Assembly has acted to change a judicial interpretation of its statutes as recently as last year. In *Virginia Department of Corrections v. Surovell*, 290 Va. 255, 776 S.E.2d 579 (2015), this Court interpreted Virginia's Freedom of Information Act ("FOIA") to "create[] no requirement of partial disclosure or redaction." *Id.* at 268, 776 S.E.2d at 586. By the very next session of the General Assembly, the legislature added Va. Code § 2.2-3704.01 to FOIA, requiring public agencies to redact portions of documents that could be withheld instead of withholding the documents in their entirety. *See* 2016 Va. Acts Ch. 620 (2016); 2016 Va. Acts Ch. 716 (2016).

If the General Assembly had thought *Hines* was wrong, it would have done something to wipe *Hines* off the books. It has not. Under this Court's precedent, that failure to act has persuasive legal effect.

b. Multiple executive agencies have also acquiesced to the holding in *Hines.*

The General Assembly's acquiescence is enough, on its own, to demonstrate that the *Hines* court got it right by holding that § 18.2-53.1 permits only a three-year mandatory minimum sentence for a first conviction. But in addition, the holding has been left unchallenged by several different executive agencies.

At the time of the *Hines* decision, the Attorney General of the Commonwealth was Kenneth T. Cuccinelli, II. *Hines*, 59 Va. App. at 567, 721 S.E.2d at 793. Despite the Commonwealth arguing for a different interpretation than the court's ultimate conclusion, Attorney General Cuccinelli did not have the Commonwealth appeal the ruling to this Court.[6] Now under the direction of a different Attorney General, from an opposing political party, the Commonwealth has openly adopted the *Hines* holding.

That holding has been adopted by more than just the statewide officials, as well. The duly elected Commonwealth's Attorney for the City of

[6] A search of the Court's ACMS for various iterations of "Terra Nyree Hines," the appellant in *Hines*, yields no petition for appeal from the decision.

Danville has embraced the *Hines* ruling, informing the Court of that decision in May 2016.

There is not a single executive official charged with enforcing the laws of the Commonwealth who opposes applying the *Hines* ruling in this case. The legislature has not taken a single action to amend or overturn the *Hines* ruling, despite the passage of half a decade. Even if the *Hines* holding were debatable at the time it was handed down, it has been embraced and applied consistently in the years since. The Court should not depart from a holding that is correct on its face and unchallenged in its application.

4. Because § 18.2-53.1 only permits a three-year sentence for a first conviction, Mr. Graves's five-year sentence was excessive, rendering the entire sentencing order void *ab initio*, and he is entitled to a new sentencing hearing.

Under *Rawls v. Commonwealth*, 278 Va. 213, 683 S.E.2d 544 (2009), "a sentence imposed in violation of a prescribed statutory range of punishment is void *ab initio* because the character of the judgment was not such as the Court had the power to render. Thus, a criminal defendant in that situation is entitled to a new sentencing hearing." *Id.* at 221, 683 S.E.2d at 549 (internal quotations, citations, and alterations omitted); *see also Grafmuller v. Commonwealth*, 290 Va. 525, 778 S.E.2d 114 (2015) (applying *Rawls* in the context of defendants who plead guilty and are

sentenced by a judge instead of a jury). The five-year sentence imposed on Mr. Graves for a first conviction under § 18.2-53.1 exceeded the three-year term prescribed by statute. The sentence was consequently void *ab initio*, and Mr. Graves was entitled to attack it through this motion to vacate, notwithstanding Rule 1:1 and the twenty-one day rule. *Rawls*, 278 Va. at 217–18, 683 S.E.2d at 547 (collecting cases recognizing "that a motion to vacate is an appropriate procedural device to challenge a void conviction").

Because the Court does not engage in "speculation regarding what would have happened if the proper statutory limitations were observed," *Burrell v. Commonwealth*, 283 Va. 474, 480, 722 S.E.2d 272, 275 (2012), the proper remedy is to vacate the entire sentencing order and remand for resentencing. In *Burrell*, the Court applied *Rawls* to determine an excessive sentence was void. *Id.* The Court held "that the ultra vires provision in the sentencing order results in the entire sentencing order being void *ab initio*." *Id.*

The same logic applies here. The circuit court imposed multiple sentences on Mr. Graves as part of one all-encompassing determination of punishment. But when it did, the circuit court was clearly operating under the mistaken belief that it could impose more time on Mr. Graves than § 18.2-53.1 permits. The sentencing guidelines worksheet shows that Mr.

Graves received an “Additional Offenses” score of 8, with a primary offense of first degree murder. (SA 4.) The only way to arrive at that score is with two counts each carrying a five-year maximum. The Court should remand for resentencing in order to avoid engaging in speculation about how the circuit court might act differently sentencing Mr. Graves if the proper statutory limitations were observed.

Conclusion

Recognizing that § 18.2-53.1 permits only a three-year fixed term of incarceration, of which no portion can be suspended, would not re-write the statute or fail to give effect to any word within it. Instead, it would apply the term of art “mandatory minimum” as defined in the Code, harmonize § 18.2-53.1 with the general criminal sentencing statutes in Virginia, and give effect to the General Assembly’s long-held and consistently expressed legislative intent.

Because the five-year sentence imposed on Mr. Graves for a first offense exceeds the punishment authorized by statute, Mr. Graves requests that the Court reverse the circuit court’s order dismissing his motion to vacate sentence, and remand to the circuit court with instructions to grant the motion to vacate and to hold a re-sentencing hearing.

Respectfully submitted,

/s/ Paul M. Wiley

Paul M. Wiley (VSB #89673)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-8893
(202) 637-5910 (Fax)
paul.wiley@hoganlovells.com

Certificate of Service

I hereby certify on this 22nd day of March, 2017 that Rule 5:26 has been complied with, and that ten copies of this brief have been hand filed with the Clerk's Office of the Supreme Court of Virginia, an electronic copy filed through VACES, and a copy has been emailed to opposing counsel this same day.

/s/ Paul M. Wiley

Appendix A: List of bills introduced, by session

2013

- HB1746
- HB1847
- HB2235
- HB2269
- SB97
- SB832
- SB868
- SB1205
- SB1214

2014

- HB257
- HB716
- HB1112
- SB353
- SB373
- SB594

2015

- HB716
- HB2040
- SB710
- SB831

2016

- HB439
- HB607

2017

- HB1407
- HB1511
- HB2253
- SB1008