SCV: Submitted on 04-18-2017 09:23:05 EDT for filing on 04-18-2017

**IN THE**

**SUPREME COURT OF VIRGINIA**

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**RECORD NO. 160688**

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**ALPHONZO DORRELL GRAVES,**

***Appellant,***

**v.**

**COMMONWEALTH OF VIRGINIA,**

***Appellee.***

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# BRIEF FOR THE COMMONWEALTH

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**BRIEF FOR THE COMMONWEALTH**

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## STATEMENT OF THE CASE

This appeal addresses the denial by the Circuit Court of the City of Danville of Alphonso Dorrell Graves's motion to vacate his criminal convictions. Graves pled guilty to first-degree murder, use of a firearm, and possession of a firearm by a convicted felon. On July 6, 2007, the court sentenced Graves to 60 years' imprisonment, with 35 years suspended, for the murder; five years' imprisonment, with three suspended, for the

possession of a firearm by a felon' and five years' imprisonment, with two suspended, for the use of a firearm in the commission of murder. (App. 4-6).

On January 29, 2016, Graves filed a motion to vacate his sentences in the Danville Circuit Court. Together with other claims not before this Court, Graves alleged that his sentence for use of a firearm exceeded the punishment authorized by Virginia Code § 18.2-53.1. (App. 31-33). The circuit court denied the motion on February 10, 2016 (App. 59), ruling in an accompanying letter opinion that "[t]he Court had both subject matter and personal jurisdiction when it originally ruled in this case." (App. 60).

On February 10, 2017, this Court granted an appeal.

## ASSIGNMENT OF ERROR[1]

The defendant has assigned the following error:

> **The trial court erred when it imposed a sentence in excess of the statutory mandatory minimum.**

## STATEMENT OF FACTS

The facts surrounding Graves's crimes are irrelevant to the issues presented here. When Graves pled guilty to use of a firearm in the commission of murder, he was advised by the court, with the concurrence

[1] Although this Court granted the appeal as to two assignments of error, the petitioner has withdrawn one assignment.

of defense counsel, that the maximum sentence for that crime was five years' imprisonment. (App. 94). When Graves appeared for sentencing on July 6, 2007, the sentencing guidelines reflected a midpoint for all his sentences at 31 years and 6 months. (App. 146). The court sentenced Graves to a total of 70 years' imprisonment with 40 years suspended, including five years' imprisonment with two years suspended for the use of a firearm in the murder. (App. 4-6).

## ARGUMENT

**THE CIRCUIT COURT ERRED IN SENTENCING GRAVES TO FIVE YEARS' IMPRISONMENT BECAUSE THAT SENTENCE EXCEEDED THE MAXIMUM ALLOWABLE SENTENCE.**

Graves argues that the maximum sentence for use of a firearm in the commission of a murder is three years, the mandatory minimum set by Code § 18.2-53.1. He argues that, as a result, his five-year sentence is void.

Consistent with the position it has taken since this issue was decided in *Hines v. Commonwealth*, 59 Va. App. 567, 721 S.E.2d 792 (2012), the Commonwealth is constrained to admit that Graves's sentence exceeds the maximum allowed by statute and therefore is void, *see Grafmuller v.*

*Commonwealth*, 290 Va. 525, 529, 778 S.E.2d 114, 116 (2015).[2] This Court should vacate his sentence on that charge, and remand to the circuit court with direction to reduce the sentence to three years.[3]

**Standard Of Review**

Because determination of the issues presented here requires the interpretation of statutes, the case "presents a pure question of law, which [this Court] review[s] de novo." *Young v. Commonwealth*, 273 Va. 528, 533, 643 S.E.2d 491, 493 (2007).

**The Sentence Imposed on Graves Was Excessive**

In *Hines*, the Court of Appeals addressed the identical issue raised here. For a variety of reasons, the court determined that the three-year mandatory minimum in Code § 18.2-53.1 also operates as a maximum.

First, the court explained:

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[2] As in this case, the Commonwealth conceded in *Hines* that the sentence imposed on the defendant was excessive because it was greater than three years. After conducting an "independent review of the history of Code § 18.2-53.1," the Court of Appeals came to the same conclusion. *Id.* at 582, 721 S.E.2d at 799. *See also Byrd v. Commonwealth*, No. 1426–12–3, 2014 WL 1041448, at *1 n.1 (Va. Ct. App. Mar. 18, 2014) (finding Attorney General's same position "appropriate, in light of the Supreme Court's decision in *Rawls v. Commonwealth,* 272 Va. 334, 634 S.E.2d 697 (2006), and this Court's decision in *Hines v. Commonwealth,* 59 Va. App. 567, 721 S.E.2d 792 (2012)").

[3] The Commonwealth recognizes that "[t]his court . . . is not bound to accept the suggestion of a party concerning a question of law." *Tuggle v. Commonwealth*, 230 Va. 99, 111 n.5, 334 S.E.2d 838, 846 n.5 (1985).

> Code § 18.2-53.1 contains no specification as to the class of the offense or a range within which the trial court may set a maximum term of imprisonment. In such instances, Code § 18.2-14 provides that "[o]ffenses . . . for which punishment is prescribed without specification as to the class of the offense, shall be punished according to the punishment prescribed in the section or sections thus defining the offense."

*Id.* at 575, 721 S.E.2d at 795-96. Thus, because Code § 18.2-53.1 "prescribes only a term of imprisonment of three years, application of Code § 18.2-14 provides that the mandatory minimum is the maximum as well." *Id.* at 575, 721 S.E.2d at 796.

Second, recognizing that there was ambiguity in the statute—and that, as the Commonwealth had pointed out, the absence of a specific maximum sentence made the court's construction "problematic," *id.* at 575, 721 S.E.2d at 796—the *Hines* court resolved any ambiguity in favor of a finding a three-year maximum. Specifically, the court concluded that the history of Code § 18.2-53.1 demonstrated that, in inserting the phrase "mandatory minimum" into the statute in 2004, the General Assembly did not intend to change the fixed sentences set forth in the statute. *Id.* at 576-78, 721 S.E.2d at 796-97.

As the Court of Appeals has explained, the 2004 amendment to § 18.2-53.1 was included in a package bill that amended more than two dozen statutes with minimum sentences that the General Assembly

intended to make mandatory. *See Bullock v. Commonwealth*, 48 Va. App. 359, 376-77, 631 S.E.2d 334, 343 (2006), *overruled in part on other grounds*, *Brown v. Commonwealth*, 284 Va. 538, 545, 733 S.E.2d 638, 641-42 (2012). The *Hines* court listed the 25 other statutes amended by the bill, and pointed out that the bill made no change to the prescribed punishment for any of those other crimes. Code § 18.2-53.1 was "unique" among the affected statutes "in that it contain[ed] neither a sentencing range nor a class specification." 59 Va. App. at 576, 721 S.E.2d at 796. Accordingly, the court found that the General Assembly's intent to leave unchanged the range of punishment for offenses in the other affected statutes precluded a finding that it intended to introduce to § 18.2-53.1 a range of punishment where one did not previously exist—let alone a range without a defined maximum.

Since 1976, sentences for both first and subsequent offenses under § 18.2-53.1 have been fixed sentences, not ranges. Acts 1976, ch. 430. As this Court has previously found, the 1976 amendment created "[i]nflexible penalties" of fixed length. *Ansell v. Commonwealth*, 219 Va. 759, 763, 250 S.E.2d 760, 762 (1979). The 1976 amendment also contained the following language:

> Notwithstanding any other provision of law, the sentence prescribed for a violation of the provisions of this section shall

> not be suspended in whole or in part, nor shall anyone convicted hereunder be placed on probation.

No other legislative change after 1976 had effected a different treatment of § 18.2-53.1. Thus, for almost three decades before the 2004 amendment, violations of § 18.2-53.1 carried fixed sentences that could not be suspended.

With the enactment of § 18.2-12.1 in 2004, those fixed sentences became mandatory minimum sentences that could not be suspended in full or in part. The *Hines* court held that the General Assembly intended to maintain the punishment required by § 18.2-53.1—just as it had for all the other statutes covered by the 2004 legislation—and could not have intended to "create a life sentence crime where no class for the felony is provided for" in the statute. 59 Va. App. at 580, 721 S.E.2d at 798. Indeed, it is unlikely that the legislature intended to change that long-established sentence implicitly in a bill that changed none of the ranges of sentencing for any other crime.

*Hines* is consistent with the Court of Appeals' 2006 decision in *Bullock v. Commonwealth*, which discussed the 2004 amendment's limited effect on Code § 18.2-53.1. "[T]he amended statute retained, under the definition of 'mandatory minimum' in Code § 18.2-12.1, its prohibition against suspending any part of the mandatory sentence imposed for a use

of a firearm conviction." *Bullock*, 48 Va. App. at 373, 631 S.E.2d at 341. In ruling that Code § 16.1-272(A)(1) did not override the sentencing provisions of the firearms statute, the Court of Appeals said: "To apply the juvenile sentencing provisions in place of the mandatory sentence in Code § 18.2-53.1 'would substitute a discretionary penalty for an inflexible one.'" *Id.* at 374, 631 S.E.2d at 341 (quoting *Green v. Commonwealth*, 28 Va. App. 567, 570, 507 S.E.2d 627, 629 (1998) (*Lafleur v. Commonwealth*, 6 Va. App. 190, 192, 366 S.E.2d 712, 713 (1988) (quoting *Ansell*, 219 Va. at 763, 250 S.E.2d at 763)).

The *Bullock* court found support for its interpretation in a report of the Virginia Crime Commission that had suggested the statutory changes carried forward in the 2004 bill. 48 Va. App. at 376, 631 S.E.2d at 342-43. The Commission's report recommended "amendments throughout the Virginia Code to use consistent language when describing mandatory minimum criminal sentences." Report of the Virginia State Crime Commission, *The Reorganization and Restructuring of Title 18.2*, House Document 15, 2004 Gen. Assemb., Reg. Sess. (2004) at 37. The Commission further suggested that a "definition of mandatory minimum punishment [be] added to the Code and language in various sections throughout the Code [be] conformed" with that definition. *Id.* In light of the

report, the Court of Appeals concluded that the 2004 amendment was not intended to "make substantive changes":

> It is clear, therefore, that the underlying purpose of the amendments set forth in House Bill 1059 was not to make substantive changes to the existing Code sections that required or referred to mandatory penalties, but to make the language used in those sections consistent with the new statutory definition of "mandatory minimum" set forth in Code § 18.2-12.1 and to make other minor editorial corrections where necessary. The changes in each of the twenty-five other statutes amended in House Bill 1059 are consistent with this view. . . . [The legislature] intended merely to make the terms of Code § 18.2-53.1 conform with those of Code § 18.2-12.1. Thus, the General Assembly added the phrase "mandatory minimum" to describe the terms of imprisonment to be imposed under Code § 18.2-53.1 and deleted those terms that became surplusage with Code § 18.2-12.1's addition to the Code.

*Bullock*, 48 Va. App. at 376-77, 631 S.E.2d at 343; *see also Hines*, 59 Va. App. at 577 n.6, 721 S.E.2d at 796 n.6.

Following the 2004 amendment, this Court has continued to read Code § 18.2-53.1 as "prescrib[ing] a ***specific*** penalty for individuals found guilty of use of a firearm in the commission of a felony. It requires a mandatory minimum of three years imprisonment for the first conviction and five years for subsequent convictions." *Brown v. Commonwealth*, 279 Va. 210, 223, 688 S.E.2d 185, 192 (2010) (emphasis added).

Notwithstanding the decisions of this Court and the Court of Appeals in *Ansell, Bullock*, *Hines*, and *Brown*, the General Assembly has not acted

to revise Code § 18.2-53.1 to create a maximum penalty other than three years, or otherwise to clarify that the courts have misinterpreted the statute. Because the courts have applied this interpretation of the statute for the last thirteen years without any corrective response by the legislature, the General Assembly is presumed to agree with the courts' interpretation. "The legislature is presumed to be aware of this usage. Its acquiescence is deemed to be approval." *Barson v. Commonwealth*, 284 Va. 67, 74, 726 S.E.2d 292, 296 (2012) (citing *Tazewell Cty. Sch. Bd. v. Brown*, 267 Va. 150, 163-64, 591 S.E.2d 671, 678 (2004)); *see also Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 428, 732 S.E.2d 690, 702 (2012) (legislature's "failure to express a contrary intention by enacting appropriate legislation is not only acquiescence but approval").

For all these reasons, the Commonwealth takes the same position it has since the Court of Appeals decided *Hines* in 2012, and agrees that Graves's sentence is excessive and should be vacated as void.

**Resentencing Is Not Necessary**

The Commonwealth disagrees with Graves, however, that this Court should remand this matter for resentencing on all matters, rather than simply directing the circuit court to vacate the excessive portion of the sentence. The court in *Hines* adopted the appropriate remedy—remanding

only the challenged sentence, with the direction that it be reduced to three years:

> Ordinarily, "a criminal defendant . . . is entitled to a new sentencing hearing" where "a sentence [is] imposed in violation of a prescribed statutory range of punishment." *Rawls v. Commonwealth*, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009). However, because a term of three years imprisonment is the only available sentence for the trial court to impose, a new sentencing hearing is unnecessary. *See e.g., Dargan v. Commonwealth*, 27 Va. App. 495, 499, 500 S.E.2d 228, 230 (1998) (affirming where the trial court deleted the excessive portion of an invalid sentence). Accordingly, we need not remand for a new sentencing hearing.

*Hines*, 59 Va. App. at 581, n.7, 721 S.E.2d at 798 n.7.

In *Grafmuller*, the trial court had entered sentences beyond the statutory limit for two offenses classified as Class 6 felonies. 290 Va. at 528, 778 S.E.2d at 115. The trial court on remand had the option to impose a sentence of up to five years on each offense and to run them concurrently. Here, however, the sentencing court can do nothing but impose a three-year term of imprisonment with no suspended time. And as defendant recognizes (Def. Br. at 5 n.2), the sentence could not be run concurrent with the sentences for his convictions for murder under Code § 18.2-53.1 and for possession of a firearm by a felon under Code § 18.2-308.2(A).

Moreover, in *Woodard v. Commonwealth*, 287 Va. 276, 281, 754 S.E.2d 309, 312 (2014), this Court refused to overturn the Court of Appeals' determination that Woodard's sentences for two drug offenses need not be remanded for review where that court reversed a felony-murder charge for which Woodard was tried and sentenced at the same time. The Court ruled: "Each conviction for a separate felony offense received a separate sentence. . . . And each sentence fell within the range of permissible punishment prescribed by the General Assembly." *Id.* at 281, 754 S.E.2d at 312; *see also Prieto v. Commonwealth*, 278 Va. 366, 418, 682 S.E.2d 910, 938 (2009) (on remand for resentencing on capital murder convictions, resentencing limited to those offenses).

Since the assignment of error presented here addressed only the one sentence for use of a firearm, for which a fixed sentence must be imposed, there is no need for resentencing.

## CONCLUSION

For the foregoing reasons, the judgment of the Danville Circuit Court, sentencing the defendant to five years' imprisonment for a first use of a firearm in the commission of murder, should be vacated and the trial court should be directed to impose a sentence of three years.

Respectfully submitted,

**COMMONWEALTH OF VIRGINIA**,
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## CERTIFICATE OF TRANSMISSION AND SERVICE

On April 17, 2017, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5:26(e). Copies were emailed to Paul M. Wiley, Esquire, counsel for appellant, at paul.wiley@hoganlovells.com. I certify that this document contains 2,646 words, in compliance with Rules 5:26(b) and 5:26(e).

/s/
Eugene Murphy
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