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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 26th *day of* February, 2015.

Michael J.G. Saunders, Appellant,

against Record No. 140507
Court of Appeals No. 1630-12-2

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the Court of Appeals did not err.

For the reasons stated in Toghill v. Commonwealth, ___ Va. ___, ___ S.E.2d ___ (2015) (this day decided), and those stated in the opinion of the Court of Appeals in Saunders v. Commonwealth, 62 Va. App. 793, 753 S.E.2d 602 (2014), the judgment of the Court of Appeals is affirmed. The appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Chesterfield County.

Justices Powell and Kelsey took no part in the consideration of this case.

JUSTICE MIMS, concurring.

I write separately for the reasons I state in Toghill v. Commonwealth, ___ Va. ___, ___, ___ S.E.2d ___, ___ (this day decided) (Mims, J., concurring). I add, however, that the procedural posture of this case both makes it unsuitable for

applying the good cause exception to Rule 5:25 and underscores the reasoning not to apply that exception in Toghill.

Unlike in Toghill, the appellant in this case did raise the question at issue in these appeals for the circuit court's consideration, prior to the decision of the United States Court of Appeals for the Fourth Circuit in MacDonald v. Moose, 710 F.3d 154 (4th Cir. 2013). He did so despite the fact that his argument held little prospect of success below in light of our controlling precedent in McDonald v. Commonwealth, 274 Va. 249, 645 S.E.2d 918 (2007). Rule 5:25 therefore does not apply at all in this case.

Nevertheless, the sentencing order adjudicating his guilt was entered in September 2008. It therefore was final and Rule 1:1 divested the circuit court of jurisdiction to alter its judgment more than three years before Saunders contested it during the probation revocation proceeding from which this appeal arises.* Burrell v. Commonwealth, 283 Va. 474, 478-79, 722 S.E.2d 272, 274 (2012). Accordingly, Saunders' only possible argument was the one he made here and in the Court of Appeals--specifically, that his underlying conviction for violating former Code § 18.2-361(A) was void ab initio because the statute was facially unconstitutional.

I agree with the conclusion in Toghill that the statute was not facially unconstitutional. Saunders' conviction therefore is not void ab initio. Accordingly, although he properly raised the argument below for the purposes of Rule 5:25, he could not

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* Saunders also contested the validity of his conviction in a separate motion to vacate it in December 2011. The circuit court denied the motion and that ruling is not presently before us.

challenge his conviction under the statute in a collateral proceeding.

A Copy,

Teste:

Clerk