

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.*

Joshua Brent McClary, Appellant,

against Record No. 140785  
Court of Appeals No. 0240-13-4

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.

In this case, the Court of Appeals sua sponte raised the  
question of the facial unconstitutionality of a Virginia statute.  
Cf. Gheorghiu v. Commonwealth, 280 Va. 678, 701 S.E.2d 407 (2010)  
(case did not involve the facial constitutionality of a statute and  
request for application of the good cause exception was not  
granted). For the reasons stated in Toghill v. Commonwealth, \_\_\_  
Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2015) (this day decided), 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 Stafford County.

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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 amplifies the disparity between applying the good cause exception to Rule 5:25 here when it was not applied in Gheorghiu v. Commonwealth, 280 Va. 678, 701 S.E.2d 407 (2010).

Unlike in Toghill, the appellant in this case did not raise the question at issue in these appeals, either in circuit court or in the Court of Appeals. Rather, the Court of Appeals raised the question sua sponte. These circumstances are less favorable to McClary than they were to the appellant in Gheorghiu. In that case, the appellant raised an issue to this Court after failing to timely present it to either the circuit court or the Court of Appeals. However, at least he raised the issue himself, of his own initiative. He also affirmatively requested that we apply the good cause exception to consider the new issue. We declined to do so. Id. at 688-89, 701 S.E.2d at 413. By contrast, McClary neither raised the issue in this case himself nor requested that we apply the good cause exception. Yet he manages to benefit from it where Gheorghiu did not.

Although the Court of Appeals raised the issue sua sponte in this case and then ruled against McClary, I do not see how he can be aggrieved from its adverse ruling on an issue he did not raise himself. He is no worse off from having the benefit of that

court's consideration of an issue he did not raise than he would have been if the court had never considered it at all.

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JUSTICE McCLANAHAN, concurring.

For the reasons stated in my concurring opinion in Toghill v. Commonwealth, \_\_\_ Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2015) (this day decided), I concur with the majority and would affirm the judgment of the Court of Appeals.

A Copy,

Teste:

*Beth L Harrington*

Clerk