No. 16-6452

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ADAM TOGHILL,

Plaintiff-Appellant,

v.

HAROLD W. CLARKE, Director for the Department of Corrections,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEE

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May 18, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-6452 Caption: Adam Toghill v. Harold Clarke

Pursuant to FRAP 26.1 and Local Rule 26.1,

HAROLD W. CLARKE, Director, Department of Corrections,
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Matthew R. McGuire Date: 5/17/2017

Counsel for: Defendant-Appellee

CERTIFICATE OF SERVICE

****

I certify that on 5/17/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Matthew R. McGuire
(signature)

5/17/2017
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INTRODUCTION

In 2003, the Supreme Court held in *Lawrence v. Texas*, 539 U.S. 558, that Texas could not criminalize sodomy between consenting adults in the privacy of their home. Applying *Lawrence*, this Court concluded in 2013 in *MacDonald v. Moose*, 710 F.3d 154, that Virginia's sodomy statute, Code § 18.2-361(A), was facially unconstitutional. This Court based that holding in large part on the fact that federal courts generally lack the authority to narrow State statutes.

In 2015, the Supreme Court of Virginia concluded that Code § 18.2-361(A) could be constitutionally applied to crimes against children. The Court invalidated Code § 18.2-361(A) as applied to constitutionally protected conduct between consenting adults, at issue in *Lawrence*, but the Court limited and upheld the statute's application to "sodomy involving children, forcible sodomy, prostitution involving sodomy, and sodomy in public." Accordingly, the Court upheld Toghill's conviction, which was premised on Code § 18.2-361(A), because he was convicted of soliciting oral sex from an undercover police officer he believed to be a 13-year-old girl.

ISSUES PRESENTED

(1) Whether *MacDonald v. Moose* remains good law in light of the Supreme Court of Virginia's narrowing construction of Virginia Code § 18.2-361(A).

(2) Whether Toghill's conviction under Virginia Code § 18.2-374.3(C) for soliciting oral sex on the internet from a person he believed was a young girl was contrary to, or an unreasonable application of, clearly established federal law.

STATEMENT OF CASE AND FACTS

Adam Darrick Toghill was convicted by a Louisa County jury of computer solicitation of a minor in violation of Virginia Code § 18.2-374.3(C).[1] He was sentenced to five years in prison.[2]

A. Toghill is convicted under Virginia Code § 18.2-374.3(C) after he solicits oral sex from an undercover police officer whom he believes to be a 13-year-old girl.

In March 2011, Toghill, a 32-year old man from Richmond, Virginia, answered an advertisement placed on Craigslist by an undercover deputy sheriff, Patrick Siewert.[3] "As part of his work with the Internet Crimes Against Children Taskforce," Deputy Siewert posted the advertisement, posing as a 13-year-old girl

[1] *See* JA 397-98.

[2] JA 399-400.

[3] JA 276, 288.

named "Rebecca Flynn."[4] Toghill engaged in "an approximately 80-minute email exchange" with Rebecca Flynn.[5] "After Toghill and 'Becca' exchanged photos of themselves, Toghill repeatedly expressed his desire to engage in oral sex with her, questioned her about her sexual experience, and explored potential locations where they could meet."[6] The messages were explicit:

> **Toghill:** What ru tryin to do? Not much goin on when its raining? Waht's ur age/location? I'm 32 in Richmond.
>
> **Becca:** i'm 13 suspended from skool all wee and yur right not much 2 do when itz rainin
>
> **Toghill:** 13!? Lol holy crap! Wahtd u do to get suspended?
>
> **Becca:** yea well i got into a fight with sum gurls and got kicked out
>
> **Toghill:** Lol nice what for? Did u win??
>
> **Becca:** it got broke up befor we could rally have a winner lol
>
> **Toghill:** Haha nice! Well u can get her/them later!!! So what do u like to do normally?
>
> **Becca:** u know movies an shoppin an stuff what bout you??

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[4] JA 276.

[5] *Id.*

[6] *Id.*

Toghill: Yep those are fun! I do that, work and play a lot of sports, goto the bar all that fun shit

Becca: yea i wish i was old enuf to go to tha bar lol

Toghill: Lol I didn't even drink when I was ur age. i had my fiorst beer at 15! So ur kickin my ass!

Becca: well i don't get 2 often so itz not lyke im that bad lol

Toghill: Lol u kids nowadays!!! All sex drugs and boozin at like age 10

Becca: lol yea i guess my mom says she thinks im growin up 2 fast! lol

Toghill: Better be careful with that shit!!! Just sayin! Where u live bouts? Whatcha look like?

Becca: i live out in gum spring do u know where that is??? and I guess im kinda avrage i have brown hair not fat and kinda cute i guess lol

Toghill: Yea I know where it is. That's cool!!! Pic?

Becca: i have a couple do you have any? I try not to send any unless I get 1 first lol too many creeps lol

Toghill: Lol I hear ya. Attached [photo sent]

Becca: kewl thanx! Mine it attached from holloween last year lol [photo sent]

Toghill: Lol nice. More w/o fake teeth?? ;-)

Becca: what u dont lyke my fake teeth?? lol [photo sent]

Toghill: Haha better!! Ahhhh to be like 16 again!

Toghill: Send 1 more :)

Becca: why u want another one?? lol u don't think im cute??

Toghill: Lol I do. Just said if I were 16…….

Becca: lol yea I hear ya lol

Toghill: Be begging to eat u out! Dammit laws!

Becca: lol well I think most laws are dumb anyways :D

Toghill: Lol me too

Becca: so what are we 2 do?? lol

Toghill: Lol I'd looooove to eat it

Becca: oh yeah?? well I guess thatz up 2 u! lol

Toghill: If u like it done

Becca: ive never had it before lol would u wanna be my first??

Toghill: Lol really? What have u done

Becca: just sum messin around an touchin nuthin much u know lol

Toghill: Haha where will I eat it

Becca: i dunno I mean no one is here now and mom wont be home for a long time

Toghill: Not if u haven't tried it before

Becca: what u mean??

Toghill: I've seen those shows before lol I'm not showin up at ur house, that's crazy. If it were at the mall er sumthin thatd be different

Becca: well I would totally go 2 tha mall but i got no way 2 get there we could just go somewhere in yur car u don't have 2 come 2 my house

Toghill: And meet u where

Becca: sumwhere near my house theres not much but u could just pick me up i just gotta know itz u and u r alone

Toghill: Gotcha. U know a good place we can go to eat you out?

Becca: u mean go get sum food or eat ME out?? Lol

Toghill: Eat you lol your pussy

Becca: lol thatz what I thought :P so yeah itz all country out here so we can go pretty much anywhere

Toghill: That all u wanna do?

Becca: well I guess itz up 2 u but im kewl with it an we can just see how it goes if u want but u would have 2 be safe ok I don't need any trouble

Toghill: On u what u wanna try?

Becca: we can start with the oral n stuff and see how we feel ;)

Toghill: Ugh I want to so bad

Becca: im ok with it if u r just tell me what time

Becca: did u leave??[7]

Toghill stopped the chat "before a time and place to meet were established."[8] But Deputy Siewert was able to identify Toghill based on "his email address and arranged to meet him at the Richmond Police Department."[9] When Toghill met with Deputy Siewert, he "admitted to chatting via email with a 13-year-old girl who was suspended from school. He also admitted to masturbating during the exchange. Toghill was subsequently arrested."[10]

Toghill was convicted in November 2012 following a jury trial of violating Code § 18.2-374.3(C)—which criminalizes solicitation of sodomy, as defined in Virginia Code § 18.2-361(A), from minors using the internet—and was sentenced to five years' incarceration.[11]

B. This Court holds in 2013 in *MacDonald v. Moose* that Virginia Code § 18.2-361(A) is facially unconstitutional.

On March 12, 2013, this Court held in *MacDonald v. Moose*[12] that Virginia Code § 18.2-361(A) was facially unconstitutional after *Lawrence v. Texas*.[13] In

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[7] JA 46-49 (quoting Commonwealth's Ex. 4, *Commonwealth v. Toghill*, No. CR11000226-00 (Louisa Cir. Ct.)). *See also* JA 381-92.

[8] JA 276.

[9] *Id.*

[10] *Id.*

[11] *See* JA 397-401.

[12] 710 F.3d 154 (4th Cir. 2013).

[13] 539 U.S. 558 (2003).

Moose, the defendant had been convicted of criminal solicitation under Virginia Code § 18.2-29, which provided "that '[a]ny person age eighteen or older who commands, entreats, or otherwise attempts to persuade another person under age eighteen to commit [a predicate felony, i.e.,] a felony other than murder,' shall be guilty of a felony."[14] The defendant's predicate felony was his solicitation of oral sex from a 17-year-old girl in violation of Code § 18.2-361(A).[15]

This Court granted the defendant's petition for a writ of habeas corpus under 28 U.S.C. § 2254. The Court concluded that the Virginia courts unreasonably applied *Lawrence* in determining that the defendant lacked standing to bring a facial challenge to the sodomy statute when his offenses involved minors.[16] Relying in large part on its view that "the invalid Georgia statute in *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986)] is materially indistinguishable from the anti-sodomy provision being challenged here," the Court held that "the anti-sodomy provision is unconstitutional when applied to any person."[17]

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[14] *Moose*, 710 F.3d at 155 (quoting Va. Code Ann. § 18.2-29).

[15] *See id.* at 156-58.

[16] *Id.* at 158, 162.

[17] *See id.* at 162-63. The Court also claimed that the reasoning in a different Supreme Court of Virginia decision, *Martin v. Ziherl*, 607 S.E.2d 367 (Va. 2005), would require § 18.2-361(A) to be invalidated. In that case, the Supreme Court of Virginia found that *Lawrence* required the invalidation of a Virginia statute that prohibited "sexual intercourse between unmarried persons." *See Moose*, 710 F.3d at 164. Because the Supreme Court of Virginia found that statute unconstitutional

The Court's conclusion was also based on its view of the role of the judiciary vis-à-vis the legislature, and its understanding that federal courts are limited in their ability to narrow State statutes.[18] Indeed, *Moose* acknowledged that *Lawrence* expressly contemplates that States may criminalize sodomy between an adult and a minor, but this Court refused to narrow Code § 18.2-361(A) to that circumstance.[19] As the Court explained, changing the statute "contemplate[s] deliberate action by the people's representatives, rather than by the judiciary."[20] Under *Ayotte v. Planned Parenthood*,[21] the Court recognized that it must be "'mindful that our constitutional mandate and institutional competence are limited'" and that it must "'restrain [itself] from rewriting state law to conform it to constitutional requirements even as we strive to salvage it.'"[22]

Given that restriction on its authority, the Court found that Code § 18.2-361(A), "which served as the basis for [the defendant's] criminal solicitation

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after *Lawrence*, this Court reasoned that "there is no valid reason why the logic of that ruling should not have applied with equal force" in *Moose*. *Id.*

[18] *See Moose*, 710 F.3d at 165-67.

[19] *Id.* at 167.

[20] *Id.* at 165.

[21] 546 U.S. 320 (2006).

[22] *Moose*, 710 F.3d at 166 (quoting *Ayotte*, 546 U.S. at 329).

conviction, cannot be squared with *Lawrence* without the sort of judicial intervention that the Supreme Court condemned in *Ayotte*."[23]

C. The Court of Appeals and the Supreme Court of Virginia reject Toghill's challenge to his conviction based on *Moose*, applying a narrowing construction of Code § 18.2-361(A) to preserve its constitutionality.

Relying on this Court's decision in *Moose*, Toghill appealed his conviction to the Court of Appeals of Virginia.[24] Toghill argued that Code § 18.2-361(A) was facially unconstitutional after *Moose*, and that his conviction for solicitation under Code § 18.2-374.3(C) was invalid because the predicate offense was a violation of the sodomy statute.[25] At the time of Toghill's conviction (as well as at the time of the conviction in *Moose*), Code § 18.2-361(A) stated: "If any person carnally knows in any manner, any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony."[26]

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[23] *Id.* at 167.

[24] *See generally* JA 275-85. Toghill also challenged the sufficiency of the evidence used to convict him and a statement by an expert witness. *See id.*

[25] *See* JA 277-78.

[26] The Virginia General Assembly amended this section in 2014 to remove the anti-sodomy provision at issue here. *See* 2014 Va. Acts ch. 794 ("If any person carnally knows in any manner any brute animal~~, or carnally knows any male or female person by the anus or by or with the mouth,~~ or voluntarily submits to such carnal knowledge, he ~~or she shall be~~ *is* guilty of a Class 6 felony~~, except as provided in subsection B~~."). The 2014 Amendment also added anal intercourse, cunnilingus, fellatio, and anilingus to Code § 18.2-374.3(C) and to other Virginia

The Court of Appeals declined to find that the statute was facially unconstitutional, noting that "[t]his case involved actions between an adult and a minor; thus, it is removed from the ruling in *Lawrence*."[27] Moreover, the court found that it was bound by the Supreme Court of Virginia's earlier decision in *McDonald v. Moose*, which had held that Code § 18.2-361(A) was not facially unconstitutional.[28]

Toghill petitioned for appeal to the Supreme Court of Virginia.[29] The Supreme Court granted review and affirmed Toghill's conviction, concluding that Code § 18.2-361(A) is not facially unconstitutional.[30] Addressing the constitutionality of Code § 18.2-361(A) for the first time since this Court's decision in *Moose*, the Supreme Court of Virginia explained that it "considers Fourth Circuit decisions as persuasive authority," but "such decisions are not binding precedent for decisions of this Court."[31]

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criminal statutes involving prostitution and children. *See* Va. Code Ann. § 18.2-374.3 (2014); *see also id.* §§ 18.2-346 (2014), 18.2-348 (2014), 18.2-356 (Supp. 2015), 18.2-368 (2014), 18.2-370 (2014), 18.2-370.1 (2014), 18.2-371 (Supp. 2015).

[27] JA 278.

[28] *See* 645 S.E.2d 918, 924 (Va. 2007); JA 277-78.

[29] *See* JA 121.

[30] *See generally Toghill v. Commonwealth*, 768 S.E.2d 674 (Va. 2015).

[31] *Id.* at 677.

Because Code § 18.2-361(A) was subject to a narrowing construction as a matter of State law, and because the statute as narrowed was constitutional as applied to Toghill, the Supreme Court of Virginia upheld his conviction.[32] The court explained that *Lawrence* does not provide adults with a "constitutional right to engage in sodomy with minors."[33] Moreover, the court concluded that the U.S. Supreme Court's decision to overrule *Bowers*—a factor this Court found significant in *Moose*—was immaterial: "*Bowers* did not involve a facial challenge to a Georgia statute, but rather the issue of whether the federal Constitution confers fundamental rights upon homosexuals to engage in sodomy."[34]

The court correctly found, however, that Code § 18.2-361(A) would be unconstitutional as applied to private acts between consenting adults.[35] Consequently, the Supreme Court of Virginia evaluated the factors enumerated in *Ayotte* and reasoned that a narrowing construction of the statute was possible and

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[32] *See id.* at 681 ("This is consistent with Virginia jurisprudence, which requires that we 'construe the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit.'") (citations omitted).

[33] *Id.* at 679.

[34] *Id.*

[35] *See id.* ("[T]he *Lawrence* opinion clearly states that individuals are entitled to respect for their private lives such that adults are entitled to engage in private, consensual, noncommercial sexual conduct without intervention of the government.").

appropriate.[36] To cure any constitutional defect in Code § 18.2-361(A), the Supreme Court of Virginia held that:

> In accordance with the *Lawrence* decision, Code § 18.2-361(A) cannot criminalize private, noncommercial sodomy between consenting adults, but it can continue to regulate other forms of sodomy, such as sodomy involving children, forcible sodomy, prostitution involving sodomy and sodomy in public. The easy to articulate remedy is that Code § 18.2-361(A) is invalid to the extent its provisions apply to private, noncommercial and consensual sodomy involving only adults.[37]

In sum, "[a]fter consideration of the factors articulated by the Supreme Court in *Ayotte*, [the Supreme Court of Virginia held] that it [was] proper to apply the 'normal rule' by prohibiting those applications of Code § 18.2-361(A) that are unconstitutional and leaving the constitutional applications of Code § 18.2-361(A) to be enforced."[38]

D. The district court dismisses Toghill's federal habeas petition.

On March 10, 2015, Toghill filed a federal habeas petition under 28 U.S.C. § 2254 in the U.S. District Court for the Western District of Virginia.[39] Relying on

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[36] *See id*. at 680-81.

[37] *Id.* at 681.

[38] *Id.* at 682.

[39] JA 5-19.

Moose, Toghill argued that Code § 18.2-361(A) was facially unconstitutional.[40] Toghill claimed that because *Moose* "declared . . . § 18.2-361(A) facially unconstitutional," his "conviction is void ab initio" since Code § 18.2-361(A) "served as the predicate felony" under Code § 18.2-374.3(C).[41] On February 23, 2016, the district court denied Toghill's habeas petition. Applying the deferential standard of review under § 2254(d), the court concluded that the Supreme Court of Virginia's decision was not contrary to, or an unreasonable application of, clearly established federal law.[42]

The district court explained that the Supreme Court of Virginia did not consider *Moose* binding precedent with respect to Code § 18.2-361(A).[43] In considering Toghill's direct appeal, the Supreme Court of Virginia "relied on *Lawrence* to determine whether Virginia Code § 18.2-361(A) could lawfully be applied to" Toghill.[44] The district court concluded that "the Supreme Court of Virginia did not unreasonably distinguish *Lawrence* . . . because, as acknowledged in both opinions, the Supreme Court of the United States excluded *Lawrence* from

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[40] JA 6. Toghill again challenged the sufficiency of the evidence and a statement by an expert witness. *Id.* The district court rejected both claims. *See* JA 97-98. Toghill has not pursued those claims on appeal. *See, e.g.*, Appellant Br. at 2 n.2.

[41] JA 9.

[42] JA 98, 100. The district court also denied Toghill's Rule 59(e) motion to amend or reconsider the judgment. *See* JA 118.

[43] *See* JA 90 & n.4.

[44] JA 89.

being the deciding authority for sodomy statutes involving minors, coercion, prostitution, or public conduct."[45] Consequently, the court concluded that Toghill's conviction under Code § 18.2-374.3(C) "falls far afield" of *Lawrence* because he used a computer to communicate "with someone he thought was 13 years old for the purposes of proposing oral sex with that child . . . ."[46]

In short, the district court held that "[n]othing about the Supreme Court's recognition of privacy rights exercised by two consenting adults in the privacy of their homes in *Lawrence*, or . . . [*Moose*], can be read to invalidate a Virginia statute enacted to protect children from electronic sexual predators."[47]

Toghill timely appealed.[48]

SUMMARY OF ARGUMENT

Toghill was convicted under a Virginia statute criminalizing the solicitation over the internet of various sexual acts from persons under the age of 15. It is undisputed that Toghill solicited oral sex via email from a person he believed to be a 13-year-old girl. This case therefore presents the uncontroversial question whether, after *Lawrence*, the Supreme Court of Virginia's decision upholding

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[45] JA 94-95.

[46] JA 96. The district court also found that Toghill's case was distinguishable from *Moose* because it involves a different Virginia criminal solicitation statute. *See* JA 95-96.

[47] JA 96.

[48] JA 115.

Toghill's conviction for soliciting sodomy from a minor is contrary to, or an unreasonable application of, clearly established federal law. Plainly it is not, and for that reason Toghill is not entitled to a writ of habeas corpus.

Toghill confuses the issue in this case with his ubiquitous reliance on this Court's decision in *Moose*. But *Moose* is no longer good law in light of the Supreme Court of Virginia's narrowing construction of Virginia Code § 18.2-361(A). After the Supreme Court of Virginia's decision on direct appeal in this case, Code § 18.2-361(A) cannot be said to criminalize private, consensual sodomy between adults, the conduct constitutionally protected by *Lawrence*. And the U.S. Supreme Court has been explicit that when a State's highest court narrows a state statute, that Court's construction of the statute is just as binding on federal courts as if the State legislature had revised the statute. The Supreme Court of Virginia is the final decisionmaker on the meaning of Virginia law.

In sum, Toghill has no claim because *Moose*'s interpretation of Code § 18.2-361(A) has been superseded by the Supreme Court of Virginia's. And *Lawrence* expressly contemplated that States may continue to criminalize sodomy with a minor. Thus, the Supreme Court of Virginia's decision to uphold Toghill's conviction was not contrary to, or an unreasonable application of, clearly established U.S. Supreme Court law. The judgment below should be affirmed.

STANDARD OF REVIEW

This case is governed by the highly deferential standard of review under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under § 2254(d)(1), this Court may grant relief only if the State court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[49]

With respect to whether a State-court decision was "contrary to . . . clearly established Federal law," the law is "clearly established" only "in the holdings of [the U.S. Supreme Court]."[50]

> Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the U.S. Supreme Court] on a question of law or if the state court decides a case differently than [the U.S. Supreme] Court has on a set of materially indistinguishable facts.[51]

With respect to whether a State-court decision was "unreasonable," "so long as 'fairminded jurists could disagree on the correctness of [a] state court's decision,' a state court's adjudication that a habeas claim fails on its merits cannot

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[49] *See Knowles v. Mirzayance*, 556 U.S. 111, 121 (2009).

[50] *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011).

[51] *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

be overturned by a federal court."[52] "'[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable.'"[53] "The standard of an 'unreasonable' application of federal law requires a 'substantially higher threshold' to obtain relief than the standard of an 'incorrect' application of federal law."[54]

The AEDPA standard "'is difficult to meet'" and "'that is because it was meant to be.'"[55]

ARGUMENT

On direct review of Toghill's conviction, the Supreme Court of Virginia expressly adopted a narrowing construction of Virginia Code § 18.2-361(A). When, as here, a State's highest court narrows the reach of a statute that might otherwise be unconstitutional, federal courts are bound by that narrowing construction as an authoritative interpretation of State law.[56] Indeed, the U.S. Supreme Court has made it clear "that a state court's interpretation of state law, *including one announced on direct appeal of the challenged conviction*, binds a

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[52] *Richardson v. Branker*, 668 F.3d 128, 138 (4th Cir. 2012) (quoting *Harrington*, 131 S. Ct. at 786).

[53] *Id.* at 139 (quoting *Harrington*, 131 S. Ct. at 786).

[54] *Id.* at 138 (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)).

[55] *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013) (citation omitted).

[56] *See, e.g.*, *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971).

federal court sitting in habeas."[57] Consequently, Toghill is wrong that *Moose* controls this case.[58] *Moose* was decided *before* the statute was narrowed by the Supreme Court of Virginia. Accordingly, that narrowing construction has saved the statute from any claim of facial invalidity. And because that narrowing construction now controls, *Moose* is no longer good law.

Because, as authoritatively construed by the Supreme Court of Virginia, Code § 18.2-361(A) does not criminalize sodomy in private between consenting adults, the statute does not violate *Lawrence*. Indeed, *Lawrence* did not hold unconstitutional State statutes criminalizing the conduct for which Toghill was convicted: soliciting oral sex from a person he believed was a young girl.[59] Because the Supreme Court of Virginia's decision is not contrary to, or an unreasonable application of, *Lawrence*, the judgment below should be affirmed.

[57] *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

[58] *See, e.g.*, Appellant Br. at 17-23, 41-43.

[59] *See Toghill*, 768 S.E.2d at 676-77.

I. *Moose* is no longer good law.

A. The Supreme Court of Virginia properly adopted a narrowing construction of a Virginia statute to save it from being facially unconstitutional.

The U.S. Supreme Court has long held that "[a] State's highest court is unquestionably 'the ultimate exposito[r] of state law.'"[60] It is for "the [Virginia] Supreme Court to say what [Virginia] law is," and that determination "merits respect in federal forums."[61] This Court therefore must "accept as binding" a State's highest court's "construction of state" law.[62] The U.S. Supreme Court has explicitly instructed federal courts to "regard[]" constructions of a state statute "by the highest court of the State" "*as a part of the provision* when [the federal courts] are called upon to determine whether it violates *any right* secured by the Federal Constitution."[63]

In *Moose*, this Court held that—because Code § 18.2-361(A) "prohibit[s] sodomy between two persons without any qualification"—the statute was "facially

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[60] *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)). *See also Winters v. New York*, 333 U.S. 507, 513-14 (1948); *Murdock v. Memphis*, 87 U.S. 590, 635-36 (1874).

[61] *Riley*, 553 U.S. at 425.

[62] *Mullaney*, 421 U.S. at 691 ("[W]e accept as binding the Maine Supreme Judicial Court's construction of state homicide law.").

[63] *Lindsley v. Nat'l Carbonic Gas Co.*, 220 U.S. 61, 73 (1911) (emphasis added); *see also Reese v. Vankirk*, No. 93-1680, 1994 U.S. App. LEXIS 1454, at *8-9 (4th Cir. Jan. 31, 1994) ("This interpretation by the Supreme Court of Appeals of West Virginia . . . is, of course, binding on us . . . .") (quoting *Lindsley*).

unconstitutional."[64] Given the breadth of the statute, the Court believed that it could not save it through a narrowing construction.[65] Thus, a majority of the Court concluded that the statute was invalid under *Lawrence*.[66]

But this case presents the situation where a State's highest court has narrowed a State statute to avoid any constitutional infirmity. In Toghill's direct appeal, which arose after *Moose*, the Supreme Court of Virginia was presented with an independent opportunity to address a constitutional challenge to Code § 18.2-361(A).[67] Correctly recognizing that it was not bound by *Moose*, the court considered Toghill's constitutional challenge to Code § 18.2-361(A) de novo.[68] In doing so, the court "'construe[d] the plain language of [the] statute to have limited application,'" holding that "§ 18.2-361(A) is invalid [only] to the extent its

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[64] *Moose*, 710 F.3d at 166.

[65] *See id.* at 167 ("The anti-sodomy provision itself . . . cannot be squared with *Lawrence* without the sort of judicial intervention that the Supreme Court condemned in *Ayotte*.").

[66] *See id.* at 166.

[67] *Toghill*, 768 S.E.2d at 676 ("Toghill assigns error as follows: The Court of Appeals erred in holding that Virginia's anti-sodomy law was constitutional, with the result that Toghill was convicted of soliciting a minor to commit an act that was not, in actuality, a violation of Virginia law.").

[68] *Id.* at 677 (citing *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring)). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (criticizing the Ninth Circuit for suggesting that a state court would be bound by the federal circuit's construction of federal law; citing *Lockhart*, 506 U.S. at 375-76 (Thomas, J., concurring), for the proposition that the "Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law").

provisions apply to private, noncommercial and consensual sodomy involving only adults."[69] Under that narrowing construction, Code § 18.2-361(A) continues to proscribe "sodomy involving children, forcible sodomy, prostitution involving sodomy, and sodomy in public."[70] Unless modified by the Virginia General Assembly or by a later decision of the Supreme Court of Virginia, Code § 18.2-361(A) must be treated as if that interpretation was "written into the statute[]."[71]

The Supreme Court of Virginia's decision to narrow Code § 18.2-361(A) was proper because State courts have greater leeway than federal courts to issue limiting interpretations of state statutes. The U.S. Supreme Court has expressly restricted federal courts' authority in this area, stating that federal courts "are 'without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.'"[72] So if a State statute is unconstitutionally overbroad—i.e., it criminalizes conduct that is protected under

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[69] *Toghill*, 768 S.E.2d at 681 (citation omitted).

[70] *Id.* The Virginia Supreme Court has expressly applied *Toghill* to uphold an individual's conviction under § 18.2-361(A) for sodomy in a public place. *See McClary v. Commonwealth*, No. 140785, 2015 Va. Unpub. LEXIS 17 (Va. Feb. 26, 2015); *McClary v. Commonwealth*, No. 0240-13-4, 2014 Va. App. LEXIS 152 (Va. Ct. App. Apr. 29, 2014).

[71] *Hebert v. Louisiana*, 272 U.S. 312, 316-17 (1926). As noted above, the Virginia General Assembly has modified § 18.2-361 and other Virginia criminal statutes since this Court's decision in *Moose*. *See supra* note 26.

[72] *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)).

the First Amendment—"[o]nly the [State] courts can supply the requisite [narrowing] construction, since of course '[federal courts] lack jurisdiction authoritatively to construe state legislation.'"[73] Given that precedent, it was reasonable for this Court to believe in *Moose* that it could not narrow Code § 18.2-361(A).[74] But the Supreme Court of Virginia plainly has that power.[75]

There is no merit to Toghill's argument that the Supreme Court of Virginia lacked authority to adopt a saving construction of Code § 18.2-361(A) because a federal court had previously found the statute facially unconstitutional.[76] Indeed, his argument fundamentally misunderstands the relationship between federal and State courts with respect to the construction of state statutes. Toghill wrongly claims that "[t]he Supreme Court of Virginia's attempts to limit the reach of the anti-sodomy statute . . . run head first into several controlling U.S. Supreme Court

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[73] *Gooding v. Wilson*, 405 U.S. 518, 520 (1972) (quoting *Thirty-Seven (37) Photographs*, 402 U.S. at 369). *See also Ayotte*, 546 U.S. at 329-30.

[74] *See Moose*, 710 F.3d at 167 ("The anti-sodomy provision itself, however, which served as the basis for MacDonald's criminal solicitation conviction, cannot be squared with *Lawrence* without the sort of judicial intervention that the Supreme Court condemned in *Ayotte*."); *see also Grayned v. Rockford*, 408 U.S. 104, 110 (1972) ("[I]t is not within our power to construe and narrow state laws.").

[75] *See Riley*, 553 U.S. at 425; *Gooding*, 405 U.S. at 520.

[76] *See* Appellant Br. at 36-37.

decisions."[77] For support, Toghill relies on *Ayotte*, *United States v. Reese*,[78] and *Reno v. ACLU*.[79] But none of those cases supports his argument.

In *Ayotte*, the U.S. Supreme Court explained that "we restrain *ourselves* from 'rewrit[ing] state law to conform it to constitutional requirements' . . . ."[80] *Ayotte* thus was restating the undisputed principle that *federal courts* cannot narrow "a *state statute* unless such a construction is reasonable and readily apparent."[81] Nothing in *Ayotte* questioned this Court's numerous precedents describing how *State courts* may adopt a narrowing construction.[82] Toghill's reliance on *Reese* and *Reno* is misplaced for the same reason.[83]

Moreover, the Supreme Court of Virginia explained in this case why its narrowing construction satisfied *Ayotte*. After considering the factors described in

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[77] *Id.* at 36.

[78] 92 U.S. 214 (1875).

[79] 521 U.S. 844 (1997).

[80] 546 U.S. at 329 (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)).

[81] *Boos*, 485 U.S. at 330 (emphasis added).

[82] *See*, *e.g.*, *Mullaney*, 421 U.S. at 691; *Winters*, 333 U.S. at 513-14; *Murdock*, 87 U.S. at 635-36.

[83] *Reno*, 521 U.S. at 884 (addressing constitutional challenge to 47 U.S.C. § 223, a *federal statute*, and stating that "*[t]his Court* 'will not rewrite a . . . law to conform it to constitutional requirements") (emphasis added); *Reese*, 92 U.S. at 221 (describing the issue presented as "whether a penal statute *enacted by Congress*, with its limited powers . . . can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish") (emphasis added).

Ayotte, the court held "that it is proper to apply the 'normal rule' by prohibiting those applications of Code § 18.2-361(A) that are unconstitutional and leaving the constitutional applications of Code § 18.2-361(A) to be enforced."[84] The court explained that its holding was "an exercise in judicial restraint . . . allow[ing] the constitutional portions of [the] statute . . . to remain in effect and reflect[ing] the legislative preferences exhibited by the Code and the subsequent acts of the General Assembly."[85] Toghill clearly disagrees with the Supreme Court of Virginia's decision to narrow Code § 18.2-361(A), but he cites no authority for his claim that he knows better than the Supreme Court of Virginia what the Virginia General Assembly intended.[86]

In sum, what the Supreme Court of Virginia did in limiting the conduct criminalized by Code § 18.2-361(A) is directly analogous to what numerous other State courts have done in response to federal constitutional challenges.[87] A final example proves the point. In *Posadas de Puerto Rico Associates v. Tourism Co.*,

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[84] *Toghill*, 768 S.E.2d at 682.

[85] *Id.*

[86] *See* Appellant Br. at 36-37 ("The Virginia anti-sodomy provision, however, is not susceptible to [a limiting] construction because the courts would be engaged in little more than guesswork in trying to determine how and to whom [the] Virginia Legislature would apply the anti-sodomy provisions of § 18.2-361(A) in a constitutional manner.").

[87] *See, e.g.*, *R. A. V. v. St. Paul*, 505 U.S. 377, 381 (1992); *Hebert*, 272 U.S. at 316-17.

the U.S. Supreme Court upheld a Puerto Rico statute "restricting advertising of casino gambling aimed at the residents of Puerto Rico."[88] Although the statute broadly stated that no "'gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico,'" the Superior Court of Puerto Rico "issued a narrowing construction of the statute, declaring that 'the only advertisement prohibited . . . is that which is . . . to attract the resident to bet at the dice, card, roulette and bingo tables.'"[89] Relying on the same rule applicable to "one of the 50 States," the Supreme Court held that it "must abide by the narrowing construction[] announced by the Superior Court" in "reviewing the facial constitutionality of the challenged statute."[90] The Supreme Court of Virginia took the same action in this case as the Puerto Rican court in *Posadas de Puerto Rico Associates*, and its interpretation is entitled to the same respect.

B. Toghill is wrong that *Moose* controls notwithstanding the Supreme Court of Virginia's narrowing construction.

Once "the State obtain[s] an 'acceptable limiting construction' from the state courts," the U.S. Supreme Court has "made clear that . . . convictions [may] stand so long as the defendants were not deprived of fair warning."[91] Toghill does not claim that the conduct he was convicted of—soliciting oral sex from a person he

[88] 478 U.S. 328, 330 (1986).

[89] *Id.* at 332, 334-35 (citation omitted).

[90] *Id.* at 339. *See also Lindsley*, 220 U.S. at 73.

[91] *Younger v. Harris*, 401 U.S. 37, 50 (1971) (citation omitted).

believed to be a 13-year-old girl—is constitutionally protected, nor does he contend that Code § 18.2-361(A) did not give him fair warning that his conduct could be illegal.[92] Thus, the statute, "as [narrowly] construed [by the Supreme Court of Virginia,] 'may be applied to'" Toghill's conduct, which "occur[ed] prior to the construction."[93] Toghill's conviction therefore properly stands.

Toghill's core argument in this case simply is that *Moose* controls, and that the Supreme Court of Virginia had no right to disregard this Court's opinion.[94] But "the duty rests upon federal courts to apply state law . . . in accordance with the *then controlling decision of the highest state court*."[95] Thus, there is no merit to Toghill's argument that *Moose* controls until this Court overrules it en banc or until the U.S. Supreme Court overrules it.[96] The rule of orderliness is not implicated in a case like this one, where the statute *Moose* held unconstitutional has been authoritatively narrowed to not criminalize conduct protected by *Lawrence*.[97]

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[92] *See* Appellant Br. at 19-21.

[93] *Osborne v. Ohio*, 495 U.S. 103, 115 (1990) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 491 n.7 (1965)). *See also Thirty-Seven (37) Photographs*, 402 U.S. at 375 n.3 ("[O]nce the overbreadth of a statute has been sufficiently dealt with, it may be applied to prior conduct foreseeably within its valid sweep.").

[94] Appellant Br. at 17. *See also id.* Part D ("The Supreme Court of Virginia's Recalcitrance Should Not be Countenanced by this Court").

[95] *Vandenbark v. Owens-Ill. Glass Co.*, 311 U.S. 538, 543 (1941).

[96] Appellant Br. at 41-43.

[97] *See, e.g.*, *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944) ("[A] judgment of a federal court ruled by state law and correctly applying that law as authoritatively

II. Toghill's conviction under Virginia Code § 18.2-374.3(C) was not contrary to, or an unreasonable application, of *Lawrence*.

The Supreme Court of Virginia's decision to uphold Toghill's conviction as constitutional was not contrary to, or an unreasonable application of, clearly established federal law. As Toghill recognizes, the federal precedent applicable to this case is *Lawrence*.[98] But *Lawrence* plainly does not render unconstitutional state statutes criminalizing sodomy involving minors.[99] Thus, Toghill has no claim in light of the Supreme Court of Virginia's narrowing construction of the statute.

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declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones."). *See also Helton v. AT&T Inc.*, 709 F.3d 343, 354 (4th Cir. 2013) ("[W]hen interpreting our precedent, we seek to reconcile our past decisions, not adopt interpretations that place them squarely in conflict."). To the extent the panel disagrees, believes that it is bound by *Moose*, and disregards the Supreme Court of Virginia's binding construction of Code § 18.2-361(A), Appellee respectfully submits that *Moose* was wrongly decided and should be overruled by the en banc court. *See, e.g.*, *Demetres v. East West Constr., Inc.*, 776 F.3d 271, 275 (4th Cir. 2015) ("Only the full court, sitting en banc, can overrule a panel decision.").

[98] *See, e.g.*, Appellant Br. at 34 ("The binding case on Virginia courts was therefore not [*Moose*], but *Lawrence*. The only issue then is what did *Lawrence* actually hold."). Toghill's concession that *Lawrence* is the relevant precedent comports with the established principal that "[c]ircuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced.'" *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) (quoting *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam)).

[99] *Lawrence*, 539 U.S. at 572-73, 578; *Moose*, 710 F.3d at 164-65; *Toghill*, 768 S.E.2d at 679. *See also* Appellant Br. at 19 ("[E]veryone (including this Court, the Virginia courts, and the Petitioner herein) agrees 'that a state could, consistently

A. *Lawrence* does not invalidate State criminal statutes that prohibit the solicitation of sodomy from a minor.

Virginia Code § 18.2-361(A), as authoritatively construed and limited by the Supreme Court of Virginia in this case, does not violate *Lawrence*. In *Lawrence*, the Court found unconstitutional a Texas statute criminalizing sodomy between "two adults who [acted] with full and mutual consent from each other."[100] But *Lawrence* was very clear that the decision did not involve prohibitions on other conduct:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.[101]

In light of those express carve-outs, *Lawrence* held only that States may not criminalize private, consensual sodomy between adults.

Thus, to the extent Code § 18.2-361(A) did criminalize conduct protected by *Lawrence*, the Supreme Court of Virginia cured that defect with its narrowing construction. Because *Lawrence* expressly excepted State statutes criminalizing sodomy involving minors, prostitution, and public places, Toghill cannot show

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with the Constitution, criminalize sodomy between an adult and a minor . . . .'") (citation omitted).

[100] 539 U.S. at 578.

[101] *Id.*

how punishing him for soliciting oral sex from a person he believed was a 13-year-old girl violates his constitutional rights. Moreover, he certainly cannot meet his burden to maintain a facial challenge to the statute, which requires him to demonstrate "'that no set of circumstance exists under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications."[102] That Code § 18.2-361(A) could have "operate[d] unconstitutionally under some conceivable set of circumstances," before the Supreme Court of Virginia narrowed its scope, "is insufficient to render [the statute] wholly invalid."[103] Today Code § 18.2-361(A) criminalizes only conduct that is not protected by *Lawrence*.

B. *Lawrence*'s decision to overrule *Bowers* does not invalidate Toghill's conviction.

Relying on *Moose*, Toghill argues in effect that Code § 18.2-361(A) could never be saved by a narrowing construction because *Lawrence* overruled *Bowers*.[104] According to Toghill, because the Texas statute at issue in *Lawrence* and the Georgia statute at issue in *Bowers* could not survive a facial challenge after

[102] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citation omitted).

[103] *United States v. Salerno*, 481 U.S. 739, 745 (1987) (explaining that there is no "'overbreadth doctrine' outside the limited context of the First Amendment").

[104] Appellant Br. at 34.

Lawrence, neither could Code § 18.2-361(A).[105] Toghill's argument fails in several respects.

First, as discussed throughout, Code § 18.2-361(A) no longer bears any resemblance to the statutes at issue in *Bowers* or *Lawrence*.[106] This Court must treat the statute as prohibiting *only* the conduct the Supreme Court of Virginia said it prohibits as a result of that court's limiting construction: "sodomy involving children, forcible sodomy, prostitution involving sodomy and sodomy in public."[107]

Second, it is clear that *Bowers* did not involve a facial challenge to Georgia's sodomy statute. The majority opinion there stated in footnote 2 that "[t]he only claim properly before the Court . . . is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. *We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy*."[108] In light of that disclaimer, the Supreme Court of Virginia violated no clearly established Supreme Court precedent when it quoted that footnote and concluded that "the fact that the Supreme Court's decision in *Bowers* was

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[105] *Id.* at 34-35.

[106] *See supra* Part I.

[107] *Toghill*, 768 S.E.2d at 681.

[108] 478 U.S. at 188 n.2 (emphasis added).

overruled in *Lawrence* is not helpful in discerning whether a particular state statute is unconstitutional on its face."[109]

And third, there is a circuit split about "whether *Lawrence* represented a facial or an as-applied invalidation of the Texas sodomy statute."[110] Consequently, the Supreme Court of Virginia's conclusion that *Lawrence* did not render facially unconstitutional all sodomy statutes was not contrary to, or an unreasonable application of, Supreme Court precedent.[111] When *Lawrence* overruled *Bowers* it did no more than hold the Georgia statute unconstitutional in that limited application.[112] Consequently, it is impossible to say under § 2254(d)(1) that the Supreme Court of Virginia unreasonably applied clearly established Supreme Court precedent.

There is not and has never been a U.S. Supreme Court case holding facially unconstitutional State statutes that criminalize sodomy outside the context of

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[109] *Toghill*, 768 S.E.2d at 679.

[110] *Moose*, 710 F.3d at 170 (Diaz, J., dissenting) (citing *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 n.4 (1st Cir. 2012); *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 812 (7th Cir. 2005); *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004)).

[111] *See Toghill*, 768 S.E.2d at 679.

[112] *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today.").

"private, noncommercial and consensual sodomy involving only adults."[113] Because Code § 18.2-361(A), as authoritatively construed by the Supreme Court of Virginia, does not apply to "private, noncommercial and consensual sodomy involving only adults," Toghill's petition for a writ of habeas corpus must be denied. It is impossible to say that the Supreme Court of Virginia's decision upholding his conviction for soliciting oral sex from a person he believed was a 13-year-old girl was contrary to, or an unreasonable application of, clearly established federal law.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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[113] *Toghill*, 768 S.E.2d at 681. *See also Williams*, 529 U.S. at 412 (stating that § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions . . . .").

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STATEMENT REGARDING ORAL ARGUMENT

Appellees agree that oral argument may aid in the decisional process in this case.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 7,383 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/
Matthew R. McGuire

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2017, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/

Matthew R. McGuire