APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 1st day of August, 2018.

Tony Knox, Appellant,

against Record No. 171575
Circuit Court No. CL17-2750

Director, Department of Corrections, Appellee.

From the Circuit Court of the City of Virginia Beach

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

TONY KNOX,

Petitioner

v. Civil No. CL17-2750

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,

Respondent

FINAL ORDER

Upon mature consideration of the petition of Tony Knox for a writ of habeas corpus, the motion of the Respondent and authorities cited therein, a review of the record in the present case and the records in Criminal Case Nos. CR98002019-12 and -12; CR98002435-00, -05, -11, -12, and -13; CR98002435-02, -04, -06, -07, -08, and -10; and Civil Case No. CL99-2988, which are hereby made a part of the record in this matter, this Court finds:

Tony Knox is in custody pursuant to this Court's December 9, 1998 judgment wherein he was convicted of 13 felonies. On December 2, 1998, Knox pled guilty to seven felonies and was convicted of robbery, use of a firearm in the commission of robbery, attempted robbery, and grand larceny (4 counts). (Case Nos. CR98002019-12 and -12; CR98002435-00, -05, -11, -12, and -13). Also on December 2, 1998, Knox pled not guilty to six felonies, and was convicted of all six felonies by the Court: attempted malicious wounding (3 counts) and use of a firearm in the commission of attempted malicious wounding (3 counts). (Case Nos. CR98002435-02, -04, -06, -07, -08, and -10). The Court sentenced him to a total of 44 years in prison, with 22 years suspended on all 13 felonies.

Knox's first petition for appeal was dismissed by the Court of Appeals on April 9, 1999. (Record No. 0028-99-1). Knox filed a habeas petition in this Court and was granted a belated appeal. (Case No. CL99-2988).[1] The Court of Appeals granted Knox's second petition for appeal, and then affirmed his convictions on May 1, 2001. (Record No. 0533-00-1). The Virginia Supreme Court refused his subsequent petition for appeal on August 21, 2001. (Record No. 011199).

On June 5, 2017, Knox executed the present petition for a writ of habeas corpus challenging the sentences imposed for his firearm convictions and alleges as follows:

I. Virginia Code § 18.2-53.1 is so vague it violated Petitioner's 14th Amendment right to due process when the Virginia Beach Circuit Court sentenced Petitioner under § 18.2-53.1 with multiple consecutive sentences. (Mem. at 1, 2).

II. Petitioner's 14th Amendment claim is a novel claim that establishes cause to overcome the procedural default bar in a post-conviction proceeding because the issue raised by Petitioner is one of first impression. (Mem. at 1, 3).

THE PETITION IS UNTIMELY

Virginia Code § 8.01-654(A)(2) provides in relevant part that a "habeas corpus petition attacking a criminal conviction or sentence . . . shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later." The statute of limitations, therefore, lapsed in August 2002, which is one year after the Virginia Supreme Court was refused Knox's petition for appeal. Section 8.01-654(A)(2) "contains no exception allowing a

[1] The prior habeas petition asserted that: the evidence was insufficient; the Court erred in denying his motion to withdraw his plea; his attorney was ineffective for failing to investigate his case; his attorney was ineffective for not perfecting his appeal; he was denied his right to appeal; and the use of a statement that Knox alleged had been illegally obtained. Knox prevailed on the claims in which he sought a belated appeal, and the other claims were denied by order entered January 18, 2000.

petition to be filed after the expiration of these limitations periods." See Hines v. Kuplinski, 267 Va. 1, 1-2, 591 S.E. 2d 692, 693 (2004) (emphasis added). The present petition was executed over 14 years after the conclusion of direct appeal and will be dismissed as untimely.[2]

KNOX'S CLAIMS ARE ALSO DEFAULTED

Knox's claims are premised upon the Virginia Supreme Court's 2012 decision in Brown v. Commonwealth, which overruled Bullock v. Commonwealth, 48 Va. App. 359, 378, 631 S.E.2d 334, 343 (2006). It is apparent from Bullock and Brown that Knox's vagueness argument regarding § 18.2-53.1 is not "novel." The defendant's in Brown and Bullock relied upon the discretion of the trial court to run a sentence concurrent with another sentence, the authority for which has existed by statute in Virginia since 1934.[3] Knox could have asked this Court at his

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[2] Knox's claims rest primarily upon a 2012 opinion of the Virginia Supreme Court, Brown v. Commonwealth, 284 Va. 538, 733 S.E.2d 638 (2012). The rule enunciated in Brown is a legal one; it did not change the factual circumstances of Knox's case. A judicial decision is not a factual matter that forms the basis of a claim for relief. See Shannon v. Newland, 410 F.3d 1083, 1089 (9th Cir. 2005) (court decision establishing abstract proposition of law arguably helpful to petitioner's claim does not constitute "factual predicate" for that claim), cert. denied, 546 U.S. 1171 (2006); see also Hasan v. Galaza, 254 F.3d 1150, 1154 n. 3 (9th Cir. 2001) ("[t]ime begins [to run] when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance.").

[3] The discretion to run a sentence concurrently with another unless prohibited by another statute has existed since 1934. "Under the amendment of 1934 the court is given express power to order sentences to run concurrently, but in the absence of express direction, they still run consecutively." See Hudson v. Youell, 179 Va. 442, 451, 19 S.E.2d 705, 709 (1942). The statute is currently codified at § 19.2-308; see also Robertson v. Superintendent of the Wise Correctional Unit, 248 Va. 232, 234-235, 445 S.E.2d 116, 117 (1994) ("Multiple sentences to confinement 'shall not run concurrently, unless expressly ordered by the court', Code § 19.2-308, and 'in the absence of express direction, they still run consecutively', Hudson v. Youell, 179 Va. 442, 451, 19 S.E.2d 705, 709, cert. denied, 317 U.S. 630 (1942) (construing statutory ancestor of § 19.2-308).").

sentencing to run his sentences concurrently, just as both Brown and Bullock did at their sentencings.[4]

If this Court had held that it could not run the sentences concurrently, as the trial courts in Brown and Bullock did, Knox could have then proceeded in the same manner as both Brown and Bullock and sought relief on appeal. Other than Brown, Knox does not point to anything that was not available to him at his trial and sentencing in 1998 but that was available to either Bullock or Brown. In short, the necessary tools were available to Knox, but he simply did not object and his failure to do so constitutes a default, which precludes him from invoking habeas relief. See Spencer v. Commonwealth, 238 Va. 295, 302, 384 S.E.2d 785, 790 (1989) (defaulting "vagueness" argument under Rule 5:25 because it was not raised at trial); see also Riner v. Commonwealth, 40 Va. App. 440, 456-457, 579 S.E.2d 671, 679 (2003) ("fact that the law in effect at the time of a trial sets out a particular method for proceeding does not prevent a defendant from arguing that method should be different and does not excuse him from registering an objection in order to comply with Rule 5A:18.") (citing Commonwealth v. Jerman, 263 Va. 88, 92- 94, 556 S.E.2d 754, 756-58 (2002) (footnote omitted)). To be sure, Brown did not have the "benefit" of Brown and yet Brown still raised the issue and prevailed.

A petition for writ of habeas corpus is not a substitute for an appeal or a writ of error. Slayton v. Parrigan, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), cert. denied, 419 U.S. 1108

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[4] In Bullock, the defendant argued that the trial court had the discretion to modify his sentences for his § 18.2-53.1 firearm convictions because they "could be suspended in whole or in part under Code § 16.1-272(A)(1) or be set to run concurrently with each other." 48 Va. App. at 363, 631 S.E.2d at 336. In Brown, the defendant asked the circuit court to exercise its discretion to run sentences concurrently. Brown, 284 Va. at 541-42, 733 S.E.2d at 639-40 (noting that "[g]enerally, circuit courts have the authority to exercise discretion to run sentences concurrently.") (citing Va. Code § 19.2-308.).

(1975); Brooks v. Peyton, 210 Va. 318, 321-22, 171 S.E.2d 243, 246 (1969). "A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction." Morrisette v. Warden of the Sussex I State Prison, 270 Va. 188, 188, 613 S.E.2d 551, 554 (2005) (citing Slayton, 215 Va. at 30, 205 S.E.2d at 682.). Accordingly, Knox's claims are not only untimely and successive, but they are also defaulted under the rule of Slayton v. Parrigan, and will be dismissed for that reason as well.

Further, Brown did not find the statute was "vague," and Knox's "novel" argument has no merit. Due process requires that penal statutes be written so that people of common intelligence are on notice of the particular types of conduct that the statute prohibits. See, e.g., United States v. Lanier, 520 U.S. 259, 267 (1997). "'The ... principle is that no [person] shall be held criminally responsible for conduct which [that person] could not reasonably understand to be proscribed.'" Id. at 265 (quoting Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) (internal quotation omitted)). The Supreme Court has noted "the vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application.'" 520 U.S. at 266 (citation omitted).

Criminal statutes, however, are not unconstitutional simply because the language may contribute to interpretations in which reasonable minds may differ on particular applications, and the statute is sufficiently definite if "the common-sense meaning" is clear. United States v. Powell, 423 U.S. 87, 93 (1975). Knox misconceives the "void for vagueness doctrine" he seeks to invoke. "The fact that [the General Assembly] might, without difficulty, have chosen '[c]learer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague." Powell, 423 U.S. at 94 (citation

omitted). Knox has not articulated any basis for his vagueness claim other than the subsequent Brown opinion, and he certainly did not raise his concerns in a timely manner at trial and pursue them on appeal. While "vague sentencing provisions may pos[e] constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute," there is no such issue where the statute "unambiguously specifies the activity proscribed and the penalties available upon conviction." United States v. Batchelder, 442 U.S. 114, 123 (1979). In Knox's case, the penalty was expressly proscribed by statute. Knox does not assert he did not understand or know the penalty for violating the use of a firearm in the commission of a felony. Instead he seeks to expand vagueness from the clarity of the proscribed punishment to encompass the exercise of a court's discretion to run a given statutorily proscribed punishment concurrent or consecutive with other statutorily proscribed punishments that have likewise been imposed. However, a court's decision to run a sentence concurrent or consecutive is an issue of discretion, not notice.[5]

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[5] While the exercise of discretion in imposing a sentence often results in disparities, such a disparity does not amount to a violation of due process.

> Judicial discretion naturally leads to discrepancies in sentencing.... But even wide sentencing discretion in the abstract is not a violation of due process or equal protection. As we held in [United States v.] Marshall, [908 F.2d 1312, 1321 (7th Cir. 1990) (en banc), aff'd sub nom. Chapman v. United States, 500 U.S. 453 (1991)], the issue is the appropriateness of the sentence given the defendant's crime: "Discretion, even if it ends in grossly unequal treatment according to culpability, does not entitle a guilty defendant to avoid a sentence appropriate to his own crime." Id.; see Williams v. Illinois, 399 U.S. 235 (1970) ("Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear. The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences.") (emphasis added).

Holman v. Page, 95 F.3d 481, 486 (7th Cir. 1996).

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 4th day of October, 2018.

Tony Knox, Appellant,

against Record No. 171575
Circuit Court No. CL17-2750

Director, Department of Corrections, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 1st day of August, 2018 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

APPENDIX D

U.S.C.A. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

VA Code § 18.2-53.1. Use or display of firearm in committing felony

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, rape, forcible sodomy, inanimate or animate object sexual penetration as defined in § 18.2-67.2, robbery, carjacking, burglary, malicious wounding as defined in § 18.2-51, malicious bodily injury to a law-enforcement officer as defined in § 18.2-51.1, aggravated malicious wounding as defined in § 18.2-51.2, malicious wounding by mob as defined in § 18.2-41 or abduction. 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.

APPENDIX F

VA Code § 18.2-12.1: Mandatory minimum punishment; definition

"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.

there.

I have a duty to protect the community and a duty to temper what I do with some -- something that's fair to everybody. I appreciate the fact that you received your GED. It didn't go unnoticed that your mother also testified that you had gotten all A's and were doing really well in school before all of this happened.

There are a lot of charges here and I am going to go down the list. We all know -- and I'll start will the firearm charges. On the first use of a firearm -- and I guess that's in the commission of a robbery -- I'm going to sentence you to three years.

On the -- there isn't -- I guess -- I don't know if I asked -- is there any reason why we shouldn't proceed at this point?

MRS. CRUMP: No, ma'am.

THE COURT: Three years on the first use of a firearm charge. On the other three use of a firearm charges, it's going to be five years on each charge for a total of eighteen years on the firearms charges; and as counsel knows, we cannot suspend that or run it concurrent with

everything.

Going down the list of the other charges -- on the robbery charge, I'm going to sentence you to ten years.

On the attempted robbery charge, I'm going to sentence you to three years.

On the grand larceny charges, I'm going to sentence you to one year each for a total of four years.

On the attempted malicious wounding charges, I'm going to sentence you to three years on each one of those for a total of nine years; and if my mathematics is correct, that is a total of twenty-six years.

I thought about what I was going to do with the rest of this time as we went through, and I understand you have mandatory time; and to some people, they would argue that that is severe, to other people they would argue that when people use guns they deserve a severe punishment. It's not for me to make a judgment about that. It's for me -- that is what general assembly has decided and that is the way that has to be.

I do believe that you should serve some