



COMMONWEALTH of VIRGINIA

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The Honorable John R. Newhart
Sheriff, City of Chesapeake
P.O. Box 15125
Chesapeake, Virginia 23328

Dear Sheriff Newhart:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether a sheriff can place a prisoner on home/electronic incarceration during that portion of his incarceration when he is serving a mandatory minimum sentence.

Response

It is my opinion that a sheriff has statutory authority to place a prisoner on home/electronic incarceration while the prisoner is serving a mandatory minimum sentence.

Background

You relate that subsequent to a Court of Appeals of Virginia decision,¹ differences of opinion have arisen concerning the authority of a sheriff to place an offender sentenced to a mandatory minimum sentence in a home/electronic incarceration program. You believe that you may place such an offender on a home/electronic incarceration program pursuant to § 53.1-131.2(C) regardless of a mandatory sentence, provided the other criteria of this subsection have been met.

Applicable Law and Discussion

In many instances, the General Assembly requires a criminal defendant to serve some amount of time as a mandatory minimum sentence.² In 2004, the General Assembly adopted a standard definition of

¹Cuffee-Smith v. Commonwealth, 39 Va. App. 476, 574 S.E.2d 294 (2002).

²See e.g., VA. CODE ANN. § 18.2-270(B)-(C) (Supp. 2006) (imposing mandatory minimum sentence for certain repeat driving while intoxicated convictions); § 18.2-308.4(B)-(C) (2004) (imposing mandatory minimum sentence for simultaneous possession of controlled substance and firearm); VA. CODE ANN. § 46.2-301(C) (2005) (imposing mandatory minimum sentence for third or subsequent offense, within ten years, of driving on suspended license); § 46.2-357(B) (2005) (imposing mandatory minimum sentence for certain habitual traffic offenders).

mandatory minimum sentence to apply throughout the criminal code.³ When the term “mandatory minimum” appears in the *Code*, it means 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.”⁴ No part of a punishment specified as a “mandatory minimum” may be suspended in whole or in part.⁵ The General Assembly in individual criminal penalty provisions uses a variety of ways to articulate the mandatory minimum sentence language, including: “[t]wenty days of such confinement shall be a mandatory minimum sentence”;⁶ “be confined in jail for an additional mandatory minimum period of 10 days”;⁷ “shall include a mandatory minimum sentence of confinement for six months”;⁸ “shall be sentenced to a mandatory minimum term of imprisonment of two years”;⁹ “[f]ive days of such confinement shall be a mandatory minimum sentence”;¹⁰ and “punishable by a mandatory minimum term of confinement in jail of 10 days.”¹¹ In each of these instances, the trial court cannot suspend any portion of the mandatory minimum sentence. The mandatory minimum sentence places a requirement on the court to impose minimum active periods of incarceration at sentencing, but does not appear to place further limits on post-sentencing programs. You ask whether a sheriff may place a person serving a mandatory minimum sentence in a home/electronic incarceration program, notwithstanding the intent of the General Assembly that such person serve a certain period of time in confinement.

In § 53.1-131.2, the General Assembly provides statutory means for courts and sheriffs to assign convicted persons to a “home/electronic incarceration program.” A court may place certain convicted persons in such a program provided assignment to the program is a condition of probation.¹² Eligibility for assignment to such a program is limited. Persons convicted of certain enumerated criminal offenses are not eligible for assignment.¹³ The Virginia Court of Appeals has determined that courts cannot assign persons serving mandatory minimum sentences to home/electronic incarceration programs.¹⁴ A prior opinion of the Attorney General has reached that same conclusion but declined to opine on the question you presently ask concerning a sheriff’s authority.¹⁵ The Court of Appeals’ decision rested squarely on the requirement that a defendant must be on probation in order for the court to assign the defendant to a home/electronic incarceration program.¹⁶

³ See 2004 Va. Acts ch. 461, at 673, 674 (adding § 18.2-12.1 defining “mandatory minimum”).

⁴ Section 18.2-12.1 (2004).

⁵ *Id.* (applying definition of “mandatory minimum” to entire *Code*).

⁶ Section 18.2-270(B)(1).

⁷ Section 18.2-270(B)(3).

⁸ Section 18.2-270(C)(1).

⁹ Section 18.2-308.4(B).

¹⁰ Section 46.2-341.28 (2005).

¹¹ Section 46.2-357(B)(1).

¹² VA. CODE ANN. § 53.1-131.2(A) (2005).

¹³ *Id.* (prohibiting, e.g., persons convicted of first and second degree murder).

¹⁴ *Cuffee-Smith*, 39 Va. App. at 483, 574 S.E.2d at 297.

¹⁵ 1999 Op. Va. Att’y Gen 150, 152 n.7 (“I express no opinion, however, on whether § 53.1-131.2(C) would permit the sheriff or jail administrator to assign a person to a home/electronic incarceration program under the circumstances you describe.”).

¹⁶ “Because the one-year mandatory minimum sentence under Code § 46.2-357(B)(2) may not be suspended, probation may not be imposed during this period and, thus, electronic incarceration pursuant to Code § 53.1-131.2 may not be employed.” *Cuffee-Smith*, 39 Va. App. at 483, 574 S.E.2d at 297.

The General Assembly has codified a sheriff's authority (as opposed to the court's authority) to place a confined person in a home/electronic incarceration program in a different subsection of § 53.1-131.2.¹⁷ In contrast to a court's limited authority, a sheriff is authorized to act whenever a person "has been sentenced to jail or convicted and sentenced to confinement in prison but is actually serving his sentence in jail."¹⁸ In other words, the sheriff may act when a person has been sentenced to an active term of confinement.¹⁹ The statute assumes active incarceration, but makes no distinction on whether such incarceration is the result of a mandatory minimum sentence or a discretionary sentence imposed by the court. In § 53.1-131.2(C), the General Assembly has stated that certain persons convicted "of a felony violent crime, a felony sexual offense, burglary or manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute a Schedule I or Schedule II controlled substance" are ineligible for home/electronic incarceration programs. The excluded persons are similar to the persons that a court cannot place in such a program.²⁰ The list is limited and definite. Prisoners serving mandatory minimum sentences are notably absent from the list of excluded persons in § 53.1-131.2(C). The definition of "mandatory minimum" in § 18.2-12.1 refers to a court's inability to suspend any portion of the mandatory minimum sentence.²¹ It places no limitation on a sheriff's inability to place such a person on a home/electronic incarceration program.²²

The primary objective of statutory construction is to determine and give effect to the legislature's intent.²³ Courts may not "add language to the statute the General Assembly has not seen fit to include."²⁴ Therefore, "the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."²⁵

Ultimately, the principle of *expressio unius est exclusio alterius*²⁶ compels the conclusion that a sheriff may place a person serving a mandatory minimum sentence on a home/electronic incarceration program. Where the legislature carefully has carved out persons ineligible for program participation, the

¹⁷ Compare § 53.1-131.2(A) (authorizing court to assign offender to home/electronic incarceration program as condition of parole) with § 53.1-131.2(C) (authorizing sheriff to assign person sentenced to or serving time in jail to home/electronic incarceration program).

¹⁸ Section 53.1-131.2(C)

¹⁹ *Id.*

²⁰ Section 53.1-131.2(A) (excluding, *e.g.*, persons convicted of first and second degree murder, felony criminal sexual assaults, and kidnapping felonies).

²¹ See *supra* note 4 and accompanying text.

²² The Supreme Court of Virginia has held that the General Assembly's use of the term "incarceration program" in § 19.2-316.2, the Detention Center Incarceration Program, indicates that "the General Assembly has determined that participation in the Program is incarceration." *Charles v. Commonwealth*, 270 Va. 14, 18, 613 S.E.2d 432, 434 (2005). While I do not consider the decision in *Charles* as determinative of the question you ask, that decision instructs that I cannot simply disregard the statutory use of the term "home/electronic incarceration program."

²³ *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); *Tiller v. Commonwealth*, 193 Va. 418, 420, 69 S.E.2d 441, 445 (1952).

²⁴ *Holsapple v. Commonwealth*, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003).

²⁵ *Turner*, 226 Va. at 459, 309 S.E.2d at 338.

²⁶ "The mention of a specific item in a statute implies that other omitted items were not intended to be included within the scope of the statute." *Smith Mtn. Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001) (explaining maxim of "*expressio unius est exclusio alterius*").

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list may not be expanded. It is presumed that "the 'legislature chose, with care, the words it used when it enacted the ... statute.'"²⁷ The plain language of § 53.1-131.2(C) grants to a sheriff the discretionary authority to place a prisoner serving time in his jail in a home/electronic incarceration program. Such authority is not restricted beyond the eligibility restrictions of the statute itself.

Conclusion

Accordingly, it is my opinion that a sheriff has statutory authority to place a prisoner on home/electronic incarceration while the prisoner is serving a mandatory minimum sentence.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

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²⁷Simon v. Forer, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003) (quoting Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)); see also Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944) (noting that courts may not rewrite statutes, that is function of legislature).