COMMONWEALTH
v.
ANDREW ROSSETTI.

No. SJC-13036

Supreme Judicial Court of Massachusetts, Middlesex

May 5, 2022

Heard: September 8, 2021

Indictments found and returned in the Superior Court Department on December 6, 2017.

Pleas of guilty were accepted by Joshua I. Wall, J., and questions of law were reported by him to the Appeals Court.

The Supreme Judicial Court granted an application for direct appellate review.

Joseph N. Schneiderman for the defendant.

Howard P. Blatchford, Jr., Assistant District Attorney, for the Commonwealth.

Joshua M. Daniels, Reyna Ramirez, & Christine Sunnerberg, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

CYPHER, J.

This case requires us to determine whether G. L. c. 6, § 178H (a) (2) (§ 178H [a] [2]), permits an

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individual convicted of failure to register as a sex offender, subsequent offense, to be sentenced to a term of incarceration in State prison of less than five years. We hold that it does not.

Background.

We briefly recite the undisputed facts. Following a 2008 rape conviction, the defendant, Andrew Rossetti, was required to register as a sex offender. Since that time, the defendant already had been twice convicted of failure to register as a sex offender in two unrelated actions when, in 2017, a grand jury indicted him on two counts of failure to register as a sex offender, subsequent offense, under § 178H (a.) (2) -[1] In 2019, the defendant pleaded guilty on both counts and the subsequent offense enhancements. On count 1, the judge imposed a sentence of two years of probation, with the condition that the defendant comply with sex offender registration requirements. On count 2, the judge announced that he intended to sentence the defendant "to one to two years in

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the state prison," but that he was staying the sentence pending his report of the questions now before this court. With the consent of the parties, the judge then reported the following two questions to the Appeals Court, pursuant to Mass. R. Crim. P. 34, as amended, 442 Mass. 1501 (2004), and Mass. R. A. P. 5, as appearing in 481 Mass. 1608 (2019):

> "1. Whether G. L. c. 6, [§ 178H (a) (2),] permits a state prison sentence for a period of less than five years.
>
> "2. Whether the court's proposed sentence of one to two years committed to state prison is lawful under G. L. c. 6, [§ 178H (a) (2)] ."

We subsequently granted the defendant's application for direct appellate review. Based on the plain language of the statute, we answer both reported questions, "No."

Discussion.

1. *Minimum terms and mandatory minimum sentences.*

The parties' reliance on this court's varied opinions related to criminal sentencing has revealed that, over the years, our sentencing jurisprudence has become less than clear.[2] Thus, we must make plain the meaning of certain language

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in our sentencing jurisprudence before turning to the reported questions.[3]

The parties' citations to, among others, *Commonwealth v. Montarvo*, 486 Mass. 535 (2020); *Commonwealth v. Rodriguez*, 482 Mass. 366 (2019); *Commonwealth v. Wimer*, 480 Mass. 1 (2018); *Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd.*, 473 Mass. 297 (2015); *Commonwealth v. Zapata*, 455 Mass. 530 (2009); *Commonwealth v. Hines*, 449 Mass. 183 (2007); *Commonwealth v. Brown*, 431 Mass. 772 (2000); *Commonwealth v. Claudio*, 418 Mass. 103 (1994), overruled on other grounds by *Commonwealth v. Britt*, 465 Mass. 87 (2013); and *Commonwealth v. Lightfoot*, 391 Mass. 718 (1984), have revealed specifically that this court has not been as precise as is necessary in its use of the phrases "mandatory minimum sentence" and "minimum term." It also is clear from the parties' briefs that there is no clear understanding of where a minimum term ends and a mandatory minimum sentence begins.

The questions reported to this court surround whether the sentencing judge is bound by the minimum term presented in

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§ 178H (a.) (2) . The defendant argues that the statute does not create a "mandatory minimum sentence," whereas the Commonwealth argues that the statute imposes a "minimum term." Because this court's "[i]nherent powers" include "among other things, those 'whose exercise is essential to . . . [the court's] capacity to decide cases, '" *Commonwealth v. Teixeira*, 475 Mass. 482, 490 (2016), quoting *Brach v. Chief Justice of the Dist. Court Dep't*, 386 Mass. 528, 535 (1982), and because this court possesses the "inherent authority to interpret the law," *Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court*, 448 Mass. 15, 24 (2006), we take this opportunity to delineate the differences between a "minimum term" and a "mandatory minimum term of imprisonment" or "mandatory minimum sentence"[4] in order to guide

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our decision-making in this case and ensure that the lower courts have coherent principles to guide decisions related to sentencing, see *Commonwealth v. Preston P.*, 483 Mass. 759, 762 (2020) (recognizing confusion created by past jurisprudence and taking opportunity to delineate distinction between "pretrial probation" and "pretrial conditions of release" before answering reported questions); *Commonwealth v. Martinez*, 480 Mass. 777, 783 (2018) (reformulating reported questions to "provid[e] clear and simple guidance to trial courts and litigants"). *See also Commonwealth v. Claudio*, 484 Mass. 203, 205 (2020) (broadening reported question).

"As with all matters of statutory construction, our goal in construing [a] . . . statute is to ascertain and effectuate the intent of the Legislature." *Commonwealth v. Newberry*, 483 Mass. 186, 192 (2019), citing *Commonwealth* v. Curran, 478 Mass. 630, 633 (2018). "[T]he language of the statute ... is 'the principal source of insight' into the intent of the

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Legislature." *Newberry*, *supra*, quoting *Sisson v. Lhowe*, 460 Mass. 705, 708 (2011). Therefore, "we start 'with the language of the statute itself and presume, as we must, that the Legislature intended what the words of the statute say'" (quotation omitted). *Commonwealth v. Williamson*, 462 Mass. 676, 679 (2012), quoting *Commonwealth v. Young*, 453 Mass. 707, 713 (2009). "[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." *Randolph v.*

Commonwealth, 488 Mass. 1, 5 (2021), quoting *Commonwealth v. Wassilie*, 482 Mass. 562, 573 (2019). See G. L. c. 4, § 6, Third ("Words and phrases shall be construed according to the common and approved usage of the language"). When necessary, "[w]e derive the words' usual and accepted meaning from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." *Commonwealth v. Vigiani*, 488 Mass. 34, 36 (2021), quoting *Montarvo*, 486 Mass. at 536. See G. L. c. 4, § 6, Third. "Where the language of a statute is clear, [however,] courts must give effect to its plain and ordinary meaning and . . . need not look beyond the words of the statute itself." *Commonwealth v. Mendes*, 457 Mass. 805, 810-811 (2010), quoting *Massachusetts Broken Stone Co.* v. *Weston*, 430 Mass. 637, 640 (2000) .

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We reaffirm the long-held principle of statutory interpretation that we interpret a statute to effectuate the Legislature's intent, looking at words' "plain meaning" in light of "sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions," and we further note that legal terms must be defined with precision. *Randolph*, 488 Mass. at 5, quoting *Wassilie*, 482 Mass. at 573. *Vigiani*, 488 Mass. at 36, quoting *Montarvo*, 486 Mass. at 536.

We previously have not distinguished clearly between the terms "minimum term" and "mandatory minimum" sentence, [5] although, for the reasons discussed *infra*, it is clear that the Legislature conceives of the two concepts as separate and distinct. The terms must be distinguished, then, if we are to give meaning to the varied language the Legislature has employed in our sentencing statutes and effectuate legislative intent to

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develop minimum terms and mandatory minimum sentences as distinct sentencing concepts.

a. *Minimum term.*

This court understands that when the Legislature prescribes in an offense-specific statute that a defendant shall be incarcerated for "not less than" a certain number of years, such language generally defines the "minimum term" permitted under the statute, according to the plain meaning of such phrase. "Minimum" is defined as "[o]f, relating to, or constituting the smallest acceptable or possible quantity in a given case." Black's Law Dictionary 1192 (11th ed. 2019). "Term," as relevant here, is defined as a "fixed period of time." *Id.* at 1773. Thus, a minimum term as defined in an offense-specific sentencing statute generally refers to the shortest length of time to which a judge may sentence a defendant if the judge chooses to impose a sentence of incarceration.[6] In other words, if a judge sentences a defendant to a term of incarceration, the judge has no discretion to

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sentence the defendant to less than the minimum term provided by the Legislature.[7] See, e.g., *Brown*, 431 Mass. at 779 ("not less than" number in offense-specific statute "is always the shortest sentence that can be imposed").

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When sentencing a defendant to a term of incarceration in State prison, the judge must impose a sentence under the offense-specific statute and any relevant mandate of G. L. c. 279, § 24 (§ 24). With certain exceptions, § 24 mandates that an indeterminate sentence must be imposed when sentencing a defendant to incarceration in State prison.[8] *Id.* Specifically as used in § 24, "minimum term" refers to the length of time imposed as the lower end of a sentence expressed as a range; it indicates the shortest period of time to which the offender is sentenced. If the minimum term defined in the offense-specific statute differs from the minimum permissible minimum term of one year provided in § 24, the higher of the two controls as the shortest

minimum term that may be imposed for a State prison

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sentence for that offense. Thus, § 178H (a.) (2), which provides that an offender "shall be punished by imprisonment in the [S]tate prison for not less than five years," defines a minimum term of five years and, as discussed *infra*, a presumed maximum term of life. Therefore, if a judge sentences a defendant to incarceration in State prison pursuant to § 178H (a.) (2), it must be for a term ranging from, at least, five years (minimum) to, at most, life (maximum).

Because, as discussed *infra*, a minimum term defined in an offense-specific statute does not necessarily require a mandatory minimum sentence, where a judge is sentencing a defendant pursuant to a minimum term that does not contain additional language indicating such term to be part of a mandatory minimum sentence, the judge presumably retains discretion to order probation instead of incarceration[9] or, in the case of a sentence of incarceration in a house of

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correction, to suspend a sentence of incarceration.[10] See Montarvo, 486 Mass. at 541-542; *Zapata*, 455 Mass. at 531. Further, the imposition of a minimum term of incarceration presumably does not, on its own, make unavailable to the defendant various mechanisms for reducing actual time incarcerated, such as good conduct deductions. G. L. c. 127, § 129D. See *Brown*, 431 Mass. at 774 n.6. These mechanisms could reduce actual time incarcerated to less than the specified minimum term imposed by the sentencing judge.

b. *Mandatory minimum sentence.*

Although the Legislature has never officially defined "mandatory minimum sentence" or "mandatory minimum term of imprisonment," the Legislature's working definition of the terms is revealed through reported questions to this court, as well as the plain meaning of the word "mandatory."[11] Black's Law Dictionary defines "mandatory" as "[o]f, relating to, or constituting a command; required; preemptory." Black's Law Dictionary, *supra* at 1151. In 1979, the House of Representatives reported questions of law to this

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court about then-proposed sentencing legislation. In its report, the House referred to one of the pending bills as imposing "a penalty of a twenty-five year *mandatory imprisonment* with no probation, parole, furlough, or reduction of sentence *for good conduct*"[12] (emphasis added). *Opinion of the Justices*, 378 Mass. 822, 824-825 (1979). The phrase "twenty-five year mandatory imprisonment" indicates that the House understood the language of the bill to create a mandatory minimum sentence of twenty-five years. The House then described that mandatory minimum sentence to preclude the availability of "probation, parole, furlough, [and] reduction of sentence for good conduct." *Id.*

The plain meaning of "mandatory "[13] and the definition provided to this court by the House are consistent to the extent

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that they reveal the Legislature's understanding and intent that a "mandatory minimum term of imprisonment" or "mandatory minimum sentence" refers to a minimum criminal penalty that (1) the sentencing judge has no discretion to lower or otherwise avoid, and (2) once imposed, must be served fully by the defendant.[14]We also have concluded in the past that language imposing restrictions similar to those in the bills discussed in *Opinion of the Justices* operates to establish a mandatory minimum sentence. See, e.g., *Commonwealth v. Cowan*, 422 Mass. 546, 548-549 (1996) (discussing mandatory minimum sentence created by G. L. c. 269, § 10 [a], as amended through St. 1990, c. 511, §§ 2, 3 [unlawful firearms possession]); *Commonwealth v. Therriault*, 401 Mass. 237, 239, 241-242 (1987) (discussing mandatory minimum sentence

created by G. L. c. 90, § 24G [a.], as amended through St. 1982, c. 373, § 9 [vehicular homicide]). Therefore, we understand a mandatory minimum sentence both to (1) provide the minimum term to which a judge may sentence a

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defendant *and* (2) preclude judicial and executive discretion in ways that a minimum term does not.[15]

If a statute imposes a mandatory minimum sentence, the judge has no discretion to sentence a defendant to less than the statutorily defined minimum term. A mandatory minimum sentence, however, further restricts judicial discretion by precluding a judge from (1) sentencing a defendant to probation instead of incarceration, (2) ordering that a sentence be suspended, (3) placing a case on file, or (4) continuing a case without a finding. A mandatory minimum sentence also requires that a defendant be incarcerated for the full length of the mandatory minimum sentence, meaning the defendant is not eligible for,

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among other things, early release, good conduct and other sentence reductions, parole, or probation, until such mandatory minimum sentence has been served.

2. *Additional clarifications*.[16]

Having defined our understanding of both "minimum term" and "mandatory minimum," we further define our understanding of the meaning of various language used by the Legislature when drafting legislation related to sentencing, none of which we conclude is sufficient, on its own, to create a mandatory minimum sentence.

Where a sentencing statute provides that a defendant "shall be punished by imprisonment for *not less than*" a certain length of time, according to its plain language, the statute is providing the minimum term to which a judge may sentence the defendant if the judge chooses to sentence the defendant to incarceration in the first instance. We have noted before that "[l]anguage such as this has always been interpreted in the same manner: the 'not less than' phrase denotes a minimum sentence. ... It is always the shortest sentence that can be imposed, the number of years that determines parole eligibility." *Brown*, 431 Mass. at 777, 779. This language does not, however, create a mandatory minimum sentence because, under

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the rule of lenity, probation is permissible under a statute providing a minimum term but not an express prohibition on probation.

The rule of lenity requires us to give a defendant "the benefit of any rational doubt" where we conclude that a "statute is ambiguous or [we] are unable to ascertain the intent of the Legislature." *Montarvo*, 486 Mass. at 542, quoting *Commonwealth v. Richardson*, 469 Mass. 248, 254 (2014). In previous decisions interpreting sentencing statutes that are silent as to the availability of probation, we have held that such silence creates an ambiguity that must be resolved in favor of the defendant under the rule of lenity, and thus probation is available. See *Montarvo*, *supra* (where one subsection expressly prohibits probation and another does not, statute is ambiguous such that rule of lenity applies to interpret latter subsection to allow probation); *Zapata*, 455 Mass. at 531 (statute that does not prohibit probation expressly is ambiguous such that rule of lenity requires interpretation that probationary sentence is allowed).

Additionally, where our sentencing statutes all relate to the same subject matter, the sentencing of criminal defendants, "they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose." *Commonwealth v. Donohue*, 452 Mass. 256, 266-267 (2008), quoting

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Board of Educ. v. *Assessor of Worcester*, 368 Mass. 511, 513-514 (1975). See *Commonwealth v. Alfonso*, 449 Mass. 738, 744-745 (2007). Our sentencing statutes also reveal that "when the Legislature intends to bar probation, it knows how to say so explicitly." *Montarvo*, 486 Mass. at 540, quoting *Zapata*, 455 Mass. at 534. For example, G. L. c. 265, § 18B, expressly provides that no person convicted under the statute "shall . . . be eligible for probation." Other statutes include similarly express prohibitions. See, e.g., G. L. c. 90, § 24G (a.) (vehicular homicide); G. L. c. 266, § 14 (burglary and related offenses); G. L. c. 269, § 10 (a.), (d), (m) (firearms possession offenses); G. L. c. 272, § 7 (deriving support from prostitute). Thus, the absence of express language prohibiting probation in a statute creates an ambiguity that must be resolved in favor of the defendant under the rule of lenity, and probation is available.[17]

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As a result, "not less than" language, on its own, does nothing more or less than create a minimum term, as defined above.[18] This language has the same effect where the statute also defines a maximum term of incarceration. We do not distinguish between statutes that define both a maximum and a minimum term of incarceration and those that define only a minimum because, where only a minimum is expressly imposed, we presume that the maximum term of incarceration permitted under the statute is life. *Commonwealth v. Logan*, 367 Mass. 655, 657 (1975), citing *Binkley v. Hunter*, 170 F.2d 848, 849-850 (10th Cir. 1948), cert, denied, 336 U.S. 926 (1949), and *People* v. McNabb, 3 Cal. 2d 441, 444-445 (1935). See *Commonwealth v. Crayton*, 93 Mass.App.Ct. 251, 251-252 (2018); *Commonwealth v. Berardi*, 88 Mass.App.Ct. 466, 466-467 (2015). Moreover, by its plain language, a maximum term simply places a limit on judicial discretion at the upper end of a sentencing range; it

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has no relevance to the construction of a minimum term or mandatory minimum sentence.

As such, when determining whether a statute imposes a minimum term of incarceration or a mandatory minimum sentence, language that purports to create a penalty of incarceration "for life or a term of not less than X years" or "for a term of not less than X years nor more than Y years" is functionally equivalent to "not less than" language appearing on its own and, rather than establishing a mandatory minimum sentence, simply establishes the minimum term of incarceration to be imposed if a defendant is sentenced to incarceration. "Not less than" language, on its own or in conjunction with maximum term language such as that just discussed, does not establish a mandatory minimum sentence because it does not restrict mechanisms such as probation and sentence reductions that could result in a defendant being incarcerated for a shorter term than the minimum term imposed by the judge.[19]

Turning to maximum term language, where a sentencing statute provides that a defendant "shall be punished by

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imprisonment for *not more than*" a certain length of time, such language, according to its plain meaning, prohibits a judge from sentencing a defendant to a term of incarceration for more than that length of time. Thus, it creates the maximum term of incarceration that a sentencing judge may impose on a defendant and, therefore, "the maximum amount of time that the prisoner will serve in prison if he . . .is not granted parole." *Brown*, 431 Mass. at 774, quoting *Connery v. Commissioner of Correction*, 33 Mass.App.Ct. 253, 254 (1992), overruled on other grounds by *Buffalo-Water 1, LLC v. Fidelity Real Estate Co.*, 481 Mass. 13 (2018). This definition applies whether the statute also defines a minimum term of incarceration or not.[20] As discussed *supra*, the presence or absence of a maximum term is irrelevant to the analysis surrounding whether a statute creates a minimum term or mandatory

minimum sentence. The inverse is also true; the presence or absence of minimum term or mandatory minimum sentence language is irrelevant to the analysis surrounding whether a statute creates a maximum term.

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Where a sentencing statute includes language such as "no person convicted under this section shall be eligible for probation," the plain meaning of such language is that the imposition of probation is prohibited. Such language, therefore, restricts judicial discretion such that a judge may not sentence a defendant to probation and must, instead, impose a sentence of incarceration if one is specified in the statute. This language does not, however, on its own, or in conjunction with a minimum term, create a mandatory minimum sentence because, without additional restrictive language, a convicted person potentially could be eligible for good conduct and other deductions that would result in a period of incarceration of less than the term imposed by the sentencing judge.

Where a sentencing statute prohibits sentence reductions or deductions through language such as "no person convicted under this section shall receive any deductions from his sentence for good conduct," the plain meaning is that the enumerated deductions are not available to a defendant sentenced under such a statute. Such language is insufficient on its own, or in combination with a minimum term, however, to create a mandatory minimum sentence because, if probation is not likewise prohibited, a defendant could be sentenced to a term of probation rather than incarceration, or, if sentenced to

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incarceration in a house of correction, could have such sentence suspended.

In sum, we will not construe a sentencing statute to contain a mandatory minimum sentence where there is only one of the following provisions: "not less than" language, "not more than" language, a prohibition on probation, or a prohibition on sentence deductions. We further will not find a mandatory minimum sentence where "not less than" language is combined only with maximum term language, a prohibition on probation, or a prohibition on sentence deductions. Each of these provisions standing alone, or in the combinations just discussed, is insufficient to unambiguously convey the Legislature's intent to create a mandatory minimum sentence.[21]

3. *Reported questions*. Before we reach the first reported question, we must address, in light of the definitions and clarifications provided above, whether § 178H (a.) (2) creates a mandatory minimum sentence requiring incarceration in State

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prison for not less than five years.[22] We conclude that it does not.

Section 178H (a.) (2) provides in relevant part that a defendant who is convicted of failure to register as a sex offender, subsequent offense, "shall be punished by imprisonment in the [S]tate prison for not less than five years." This language constitutes the full scope of sentencing guidance provided by the Legislature to the judge when sentencing an individual convicted under § 178H (a.) (2), [23] The statute does not include language concerning a maximum term, and it is silent as to the availability of probation as an alternative to incarceration and as to sentence-reducing mechanisms, such as good conduct deductions.

As discussed *supra*, where a statute is silent as to the availability of probation, it is ambiguous such that the rule of lenity applies and leads us to conclude that the statute allows for a sentence of probation. We therefore conclude that the absence of express language prohibiting probation in § 178H (a.) (2) creates an ambiguity in the statute and, thus,

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probation is presumably available as an alternative sentence to incarceration. Because probation is presumably allowed as a sentencing option under § 178H (a.) (2), that section does not impose a true "mandatory minimum" pursuant to which a judge would have no discretion to sentence a defendant to probation.[24]

Having concluded that § 178H (a.) (2) does not impose a mandatory minimum sentence, we must determine next the import of the phrase, "not less than five years." By its plain language, and pursuant to the definitions and clarifications provided *supra*, "not less than five years" means precisely what it appears to say: a sentence of incarceration imposed under § 178H (a.) (2) must be for "not less than five years."[25] Thus,

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if a judge chooses to sentence a defendant to incarceration under § 178H (a.) (2), the minimum term of such sentence must be at least five years.[26]

Because § 178H (a.) (2) provides for "imprisonment in the [S]tate prison," the indeterminate sentencing statute, G. L. c. 279, § 24, also applies, requiring any State prison sentence imposed under § 178H (a.) (2) to be indeterminate. In reading the indeterminate sentencing statute together with an offense-specific statute such as § 178H (a.) (2), where the minimum term

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or mandatory minimum sentence provided in the offense-specific statute exceeds that provided in § 24, the two statutes facially may be applied together, and the offense-specific statute determines the minimum term to which a judge may sentence a defendant.[27]

Applied here, the five-year minimum term in § 178H (a.) (2), read together with § 24, requires a judge who chooses to sentence a defendant to incarceration in State prison to impose an indeterminate sentence, the minimum term of which may not be less than five years. We therefore answer the first reported question, whether § 178H (a.) (2) permits a judge to impose a sentence of incarceration in State prison for a term of less than five years, "No." If a judge chooses to sentence an offender to incarceration pursuant to § 178H (a.) (2), the

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minimum term imposed must be "not less than five years." Because a term of incarceration in State prison for less than five years is prohibited under § 178H (a.) (2), we also must answer the second reported question, whether the judge's proposed sentence of from one to two years committed to State prison is lawful under § 178H (a.) (2), "No."

The defendant cites to *Rodriguez*, 482 Mass. 366; *Hines*, 449 Mass. 183; and *Lightfoot*, 391 Mass. 718, for the proposition that although § 178H (a.) (2) calls for a sentence of "not less than five years," it does not actually require a sentence with a minimum term of "not less than five years." *Lightfoot* and *Rodriguez* are inapplicable here, and therefore do not support the defendant's assertion. While *Hines* arguably supports the defendant's position, we conclude today that it was wrongly decided and, therefore, is overruled. Thus, none of these cases leads us to conclude that a judge may sentence a defendant to less than a statutorily required minimum term.

The defendant's reliance on *Lightfoot*, 391 Mass. 718, is misplaced. The statute at issue in *Lightfoot* and the interplay between that statute and the version of the indeterminate sentencing statute in effect at the time bear little resemblance to the case before us. *See id.* at 719-720. The offense-specific statute at issue in *Lightfoot* provided for a determinate State prison sentence, in clear violation of the

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mandate of the indeterminate sentencing statute, G. L. c. 279, § 24, inserted by St. 1924, c. 152. *Lightfoot*, *supra* at 718 n.1, 719, citing G. L. c. 272,

§ 7, as amended through St. 1980, c. 409. As the statute at issue here imposes an indeterminate sentence that facially can be construed in harmony with § 24, *Lightfoot* is inapplicable to our analysis.

The dilemma the court faced in *Lightfoot* was that the apparently determinate sentence provided for in the offense-specific statute at issue was made somewhat less determinate by the inclusion of language providing that a sentence imposed under the statute "shall not be reduced to less than two years." *Lightfoot*, 391 Mass. at 718 n.1, quoting G. L. c. 272, § 7, as amended through St. 1980, c. 409. Because we generally seek to effectuate legislative intent rather than invalidate it, where possible, the *Lightfoot* court interpreted this language in conjunction with the specified five-year term as creating a two-year mandatory minimum sentence and a five-year maximum term, bringing the statute in compliance with the mandate of § 24.[28]*Lightfoot*, *supra* at 721. However, where, as here, the offense-

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specific statute provides clear minimum term language (i.e., "not less than") that facially complies with the mandate of § 24, the offense-specific and indeterminate sentencing statutes facially may be applied together, and there is no ambiguity that we must resolve.

Additionally, the indeterminate sentencing statute in effect when *Lightfoot* was before this court required a minimum term of at least two and one-half years in State prison, whereas the current version of the statute requires a minimum term of at least one year, with exceptions. Compare G. L. c. 279, § 24, inserted by St. 1924, c. 152, with G. L. c. 279, § 24, as amended through St. 2014, c. 189, § 6. Thus, a sentence that comported with the two-year mandatory minimum set forth in the offense-specific statute at issue in *Lightfoot* may have failed to comply with the two and one-half year minimum then required by § 24. This conflict between the statutes, which does not exist here, created potential ambiguity that, pursuant to the rule of lenity, was to be resolved in favor of the defendant. *Lightfoot*, 391 Mass. at 720. Thus, it was in that context that the *Lightfoot* court concluded that the reference to State prison was meant to render the offense a felony. *Id.* at 721-722. Such context does not exist here, where the minimum term provided for in § 178H (a.) (2), the sex offender registration statute, *exceeds* the one-year minimum term now required by the

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indeterminate sentencing statute, § 24, such that the two statutes can be read together according to their plain meanings. Thus, the defendant's reliance on *Lightfoot* is inapt.

In *Rodriguez*, this court attempted to harmonize three less than harmonious provisions of G. L. c. 269, § 10 (m) (§ 10 [m]), [29] In so doing, we held that § 10 (m) permits a State

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prison sentence of less than two and one-half years although the first provision of § 10 (m) states that offenders "shall be punished by imprisonment in a [S]tate prison for not less than two and one-half years nor more than ten years." *Rodriguez*, 482 Mass. at 373-374. G. L. c. 269, § 10 (m). The court's decision to depart from a plain language interpretation in *Rodriguez*, however, was required because *other* language in § 10 (m) rendered unclear the meaning of the above-quoted provision. See *Rodriguez*, *supra* at 368 ("if the paragraph ended there, the two provisions might be readily reconciled .... Of course, the paragraph has three, not two provisions").

The statutory structure present in G. L. c. 269, § 10 (m), is uniquely "vexing." *Rodriguez*, 482 Mass. at 368. It creates two classes of offenders, firearm identification (FID) card holders, and non-FID-cardholders, and calls for two different minimum terms of imprisonment[30] -- one of one year and another of two and one-half years -- applicable to non-FID-card holders. *Id.* at 369-370. This conflict led the court to interpret

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§ 10 (m), in light of legislative history surrounding the "truth-in-sentencing" act and the rule of lenity, as creating, "for non-FID-card holders, a lower end of the sentencing range of from one to two and one-half years, with at least one year to serve, in State prison." *Id.* at 373.

The language we interpret in § 178H (a.) (2) is nearly identical in structure to the first provision of § 10 (m), with both statutes providing that an offender "shall be punished by imprisonment in . . . [S]tate prison for not less than" a certain number of years. As the *Rodriguez* court concluded, the import of such language, without more, is clear. *Rodriguez*, 482 Mass. at 368. Unlike in G. L. c. 269, § 10 (m), and *Rodriguez*, in § 178H (a.) (2), there is no additional statutory language rendering the five-year minimum term ambiguous or in need of any interpretation beyond the plain language of the statute. As such, *Rodriguez* is inapplicable.[31]

The defendant's reliance on *Hines*, 449 Mass. 183, likewise does not preclude the answers we provide today, as the case was decided wrongly and now is overruled. The principle of stare

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decisis does not prevent us from overruling *Hines* for having been wrongly decided. "The principle of stare decisis is not absolute." *Shiel v. Rowell*, 480 Mass. 106, 108 (2018), citing *Stonehill College v. Massachusetts Comm'n Against Discrimination*, 441 Mass. 549, 562, cert, denied sub nom. *Wilfert Bros. Realty Co.* v. *Massachusetts Comm'n Against Discrimination*, 543 U.S. 979 (2004). "[W]hether it shall be followed or departed from is a question entirely within the discretion of the court." *Shiel*, *supra*, quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-406 (1932) (Brandeis, J., dissenting), overruled on other grounds by *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938). Where our sentencing jurisprudence does not currently reveal any settled or consistent legal principles surrounding minimum term language (as evidenced by the reported questions in this case), we view our decision today as departing only minimally from the principle of stare decisis. See *Knick v. Scott*, 139 S.Ct. 2162, 2177-2179 (2019). Courts must construe statutory language to effectuate legislative intent, in part, to respect the separation of powers inherent in our governmental structure, and to avoid rewriting the Legislature's statutes in a constitutionally impermissible way. See art. 30 of the Massachusetts Declaration of Rights ("the judicial [department] shall never exercise the legislative . . . powers"). Any

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departure from this principle of statutory construction, therefore, is not the kind of inconsistency that must be followed in the name of stare decisis. Where the reasons for departing from precedent outweigh the factors that favor adherence to it, we can and should acknowledge our past mistakes and cease perpetuating them. *Shiel*, *supra* at 109, citing *Franklin v. Albert*, 381 Mass. 611, 617 (1980).

"Respecting stare decisis means sticking to some wrong decisions." *Kimble v. Marvel Entertainment LLC*, 576 U.S. 446, 455 (2015). But it does not dictate that we do so here. When a court of last resort contemplates whether to overrule a past decision, it considers factors such as the quality of that decision's reasoning, whether the rule it established is workable, whether it is consistent with other related decisions, and whether there has been reliance on the decision. See *Knick*, 139 S.Ct. at 2178. See also *Shiel*, 480 Mass. at 108, quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("adhering to precedent is our 'preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'").

None of these factors favors our continued adherence to *Hines*. First, as explained *infra*, the reasoning in *Hines* was

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flawed and the outcomes unjustified. Continuing to adhere to decisions in which we did not faithfully interpret a statute consistently with legislative intent does not promote "the actual [or] perceived integrity of the judicial process." Cf. *Shiel*, 480 Mass. at 108, quoting *Payne*, 501 U.S. at 827. Second, the problematic portions of *Hines* establish no clear interpretive principles to apply to similar language in other statutes.[32] Third, *Hines* is inconsistent with *Brown*, 431 Mass. at 776-779, which, as explained *infra*, we did not reasonably distinguish in *Hines*. Finally, reliance interests are relatively low and arguably illegitimate. Parties are unlikely to have "order[ed] their affairs" in reliance on the minimum sentence they believe they could receive for a crime they might commit, and it is unclear whether we ought to recognize such reliance even if it existed. Contrast *Kimble*, 576 U.S. at 457

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(adhering to precedent is most favored when precedent concerns property or contract law).

In *Hines*, this court vacated a sentence of five years of probation imposed pursuant to G. L. c. 265, § 18B, because the statute expressly prohibits probationary sentences. *Hines*, 449 Mass. at 190. This court also concluded that the statutory language providing that a person "shall" be sentenced to a term of incarceration of "not less than five years" did not create a "mandatory minimum State prison sentence of five years" where the statute did not include the word "mandatory," despite the statute's prohibition of "probation, parole, furlough, . . . work release[, and] deduction[s] . . . for good conduct." *Id.* at 190-191, quoting G. L. c. 265, § 18B. The court then instructed the sentencing judge, on remand, to "'fix a maximum and minimum term' [of incarceration] in accordance with [the indeterminate sentencing statute,] G. L. c. 279, § 24." *Hines*, *supra* at 191-192. In so instructing, the *Hines* court appeared to allow the sentencing judge discretion to impose a sentence of less than five years. This was error.

First, the court's attempt to distinguish *Brown* is not compelling. In a footnote, the *Hines* court rejected an argument that *Brown* was dispositive, reasoning that the language of § 18B (which calls for "imprisonment . . . for not less than five years") was not similar enough to G. L. c. 265, § 18C (which

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calls for "imprisonment . . . for life or for any term of not less than twenty years") for our previous interpretation of § 18C to control our interpretation of § 18B. See *Hines*, 449 Mass. at 191 n.4. We did not explain in *Hines* the significance of the inclusion of a maximum term in § 18C and the lack thereof in § 18B. Nor has the defendant provided us with an explanation. We conclude that there is no significant difference as related to any defined minimum term, as both statutes include the relevant phrase "not less than," which, as discussed *supra*, operates to create a minimum term.

Thus, *Brown* ought to have controlled the outcome in *Hines*. But even setting *Brown* aside, the reasoning in *Hines* does not withstand scrutiny. The Legislature need not use the word "mandatory" to render its clear commands operative. See *Brown*, 431 Mass. at 776 ("The Legislature ... is not restricted to one means of expression; and in actual practice it has not so restricted itself"). The *Hines* court did not explain why the absence of the word "mandatory" was significant. Section 18B plainly restricts the minimum term of a sentence imposed consistently with § 24, and further provides that such minimum term must be served as a mandatory minimum sentence by prohibiting "probation, parole, furlough, . . . work release[, and] deduction[s] . . . for good conduct." *Hines*, 449 Mass. at 190-191, quoting G. L. c. 265, § 18B. There was no reason in

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Hines to interpret § 18B other than in accordance with its plain meaning. The absence of the word "mandatory" is irrelevant.

The fatal problem with the portion of *Hines* interpreting the phrase "for not less than five years" is that it renders that phrase meaningless. We are obligated to avoid such constructions. See *Montarvo*, 486 Mass. at 538, quoting *Ropes & Gray LLP v. Jalbert*, 454 Mass. 407, 412 (2009) ("A statute should be construed so as to give effect to each word . . . "); *Commonwealth v. Vega*, 449 Mass. 227, 231 (2007), citing *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004). We attempted to address this deficiency in *Hines* by reasoning that the language in § 18B that we had determined not to have the effect of requiring a five-year minimum State prison sentence instead had the effect of marking the underlying offense as a felony. See *Hines*, 449 Mass. at 191; G. L. c. 274, § 1 ("A crime punishable by . . . imprisonment in the state prison is a felony"). Such a construction, however, would still render the five-year minimum inoperative in a way our rules of statutory construction do not permit and risks rendering language contained across a wide range of our sentencing statutes obsolete.

For example, the statute at issue in *Hines*, G. L. c. 265, § 18B, provided that an individual convicted of an offense under the statute "shall ... be punished by imprisonment in the state prison for *not less than five years*; provided, however,

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that [if certain conditions are met], such person shall be punished by imprisonment in the state prison for *not less than ten years*" (emphasis added). If the only meaning of language imposing a State prison sentence for not less than a certain number of years is to designate an offense as a felony punishable by incarceration in State prison for at least one year under § 24, there could be no discernible reason for the Legislature to provide for two separate and distinct minimum terms in State prison under a single statute. After all, the import of both the "not less than five years" and "not less than ten years" language would only require a judge to sentence a defendant to a term of incarceration of not less than one year.

Further, the Legislature could have marked the underlying offense in § 18B as a felony by mandating only that persons convicted thereunder "shall be punished by imprisonment in the State prison" (omitting "for not less than five years"). The Legislature knows how to do this. See, e.g., G. L. c. 265, § 19 (a.) (persons convicted of unarmed robbery "shall be punished by imprisonment in the [S]tate prison for life or for *any* term of years" [emphasis added]). Thus, this interpretation of what the Legislature sought to accomplish with these provisions still problematically leaves their crucial language ("for not less than five years") meaningless and risks similarly invalidating *all* offense-specific minimum terms of more than one

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year in State prison.[33] We must avoid this interpretation. See Montarvo, 486 Mass. at 538, citing *Ropes & Gray LLP*, 454 Mass. at 412.

In *Commonwealth v. Thomas*, 484 Mass. 1024, 1026 n.8 (2020), we relied on *Hines* to conclude that § 18B did not impose a "mandatory minimum sentence of five years for a first offense," but instead should be read to impose a two-year minimum term and at least a five-year maximum term. As in *Hines*, the *Thomas* court failed to reconcile that conclusion with our rejection in *Brown*, 431 Mass. at 773, 775, of the argument that "not less than" language "establishes the *minimum* number of years the judge could impose as the higher (maximum) number of years of the sentence" because such an interpretation would be "in direct

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conflict with the plain language of the statute."[34] As in *Hines*, *Brown* should have controlled in *Thomas*.

In short, to the extent that we held in *Hines* and concluded in *Thomas* that statutory language providing that a State prison sentence must be "for not less than X years" may be ignored if neither the word "mandatory" nor an upper limit

on the length of the sentence also appears in the provision, that holding is erroneous, for it is contrary to our obligation to construe statutes in line with their plain meaning and so as to effectuate faithfully Legislative intent. See *Sharris v. Commonwealth*, 480 Mass. 586, 594 (2018).

As the court did in *Hines*, the defendant erroneously distinguishes *Brown* to argue that we should not read § 178H (a.) (2) to impose a minimum term of incarceration of five years where the statute does not provide a maximum term of incarceration.[35] The defendant notes that a maximum term was included in the statute at issue in *Brown*, which we determined

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to impose a mandatory minimum sentence.[36] Setting aside *Hines*, this argument is unavailing. The meaning of the phrase "not less than" is unaffected by whether it is followed by "or more than" language.

Further, to the extent that the defendant suggests that § 178H (a.) (2) may be invalid for its lack of a maximum term, it is well settled that where a sentencing statute imposes a minimum but not a maximum sentence, "the maximum sentence permitted by the Legislature is presumed to be a life term." *Logan*, 367 Mass. at 657. See *Berardi*, 88 Mass.App.Ct. at 467 (because § 178H [a.] [2] is presumed to carry life term, defendant tried thereunder entitled to full number of peremptory challenges required by Mass. R. Crim. P. 20 [c] [1], 378 Mass. 890 [1979]). *See also Crayton*, 93 Mass.App.Ct. at 251-252 (defendant tried under statute similarly presumed to carry life term entitled to full number of peremptory challenges).

The defendant also argues that a minimum term of incarceration of five years under § 178H (a.) (2) could result in the punishment of "passive" conduct and be so disproportionate to the conduct at issue as to render such sentence unconstitutional. However, because the issue is not raised by

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the facts presented, "we do not here decide whether in a particular case a sentence imposed pursuant to the broad" sentencing range in § 178H (a.) (2) "might be so disproportionate to the offense as to constitute cruel [or] unusual punishment." *Logan*, 367 Mass. at 657, citing *McDonald v. Commonwealth*, 173 Mass. 322, 328 (1899), aff'd, 180 U.S. 311 (1901).

In *Logan*, 367 Mass. at 656-657, this court examined whether G. L. c. 269, § 10, as amended through St. 1972, c. 312, § 5 (unlawful firearms possession), was unconstitutionally vague because it failed to specify "a maximum limit on sentences thereunder." The court held that the statute was not unconstitutionally vague because, "[u]nder such a statute[,] the maximum sentence permitted by the Legislature is presumed to be a life term." *Id.* at 657. The defendant waived argument on the reported questions addressing whether the statute constituted cruel or unusual punishment, or cruel and unusual punishment, and the *Logan* court noted in passing that it did not decide whether any specific sentence imposed "pursuant to the broad authorization in G. L. c. 269, § 10, might be so disproportionate to the offense as to constitute cruel and unusual punishment." *Id.* at 656-657. Similarly here, although § 178H (a.) (2) presumably allows for a maximum term of life, we cannot say that a life sentence imposed under § 178H (a.) (2) would be constitutional.

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We observe, however, that because a person only may be convicted of failure to register under G. L. c. 6, § 178H (a.), if such failure is "knowing[]," the defendant's argument that a mandatory minimum would punish an offender for "passive conduct" must fail. "'Knowingly' when used in a criminal statute 'commonly imports a perception of the facts requisite to make up the crime.'" *Commonwealth v. Lawson*, 46 Mass.App.Ct. 627, 629-630 (1999), quoting *Commonwealth v. Altenhaus*, 317 Mass. 270, 273 (1944). Thus, in a prosecution for a violation of G.

L. c. 6, § 178H (a.), "the Commonwealth [is] required to prove that the defendant knew of the requirement that he register but did not do so despite this knowledge. . . . Absent a defendant's *conscious disregard* of the information necessary to provide him with the requisite knowledge, the Commonwealth cannot meet its burden merely by establishing that the knowledge was available to the defendant" (emphasis added; citation omitted). *Commonwealth v. Ramirez*, 69 Mass.App.Ct. 9, 12 (2007) .

Conclusion. For the reasons discussed *supra*, we answer both reported questions, "No." Under § 178H (a.) (2), a judge may sentence a defendant convicted of failure to register as a sex offender, subsequent offense, to probation or to a term of incarceration in State prison; if sentencing a defendant to a term of incarceration in State prison, a judge must impose an

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indeterminate sentence, the minimum term of which cannot be less than five years.

So ordered.

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BUDD, C.J. (concurring) . General Laws c. 6, § 178H (a.) (2) (§ 178H [a.] [2]), states in relevant part that a "second and subsequent conviction [for failure to register as a sex offender] shall be punished by imprisonment in the [S]tate prison for not less than five years." The reported questions ask, in essence, whether § 178H (a.) (2) permits a State prison sentence for a period of less than five years. I agree with the court that the statutory language plainly requires that any State prison sentence imposed pursuant to this section must have a minimum term of incarceration of five years or greater.[1] See *Sharris v. Commonwealth*, 480 Mass. 586, 594 (2018) . I further agree that, to reach this commonsense conclusion, *Commonwealth v. Hines*, 449 Mass. 183 (2007), must be overruled to the extent that it ignores the plain meaning of similar sentencing language in G. L. c. 265, § 18B.

However, the court goes beyond the reported questions to conclude that § 178H (a.) (2) allows a judge to impose a sentence of probation in lieu of a sentence of incarceration. Generally, I believe the better practice is to focus on the issues

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reflected in the reported questions.[2] Here, although I do not take a position on the conclusion the court reaches regarding the availability of probation under § 178H (a.) (2), I am troubled by its methodology.

In the course of answering questions not presented, [3] the court creates an interpretive presumption concerning the availability of probationary sentences that departs from the

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plain meaning of statutory language and is not grounded in legislative intent. *Ante* at,, The court then applies that presumption to § 178H (a.) (2) . *Id.* at, note 25. In so doing, the court seems to disregard basic rules of statutory interpretation, thereby risking a violation of art. 30 of the Massachusetts Declaration of Rights. I therefore cannot join those portions of the opinion.

Today, the court declares that it will interpret statutes providing that certain offenders "shall be punished by imprisonment . . . for not less than [X] years" not to require that those offenders be punished by imprisonment unless the statute additionally contains language like "nor shall any such offenders be eligible for probation." *Ante* at note 9, . The court reasons that, because the Legislature included express prohibitions on probation in some sentencing statutes, the absence of an express prohibition on probation in other sentencing statutes renders ambiguous whether the Legislature intended that probation be available under those statutes that do not expressly mention it. *Id.* at . Without considering any other sources of legislative intent, the court concludes that it must resolve this supposed ambiguity by interpreting probation to be available under all such statutes. *Id.*

This reasoning disregards the plain meaning of "shall be punished by imprisonment." See *Commonwealth v. Newberry*, 483 Mass. 186, 192 (2019),

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quoting *Sisson v. Lhowe*, 460 Mass. 705, 708 (2011) (statute's plain language is "'the principal source of insight' into the intent of the Legislature"); *Commonwealth v. Williamson*, 462 Mass. 676, 679 (2012), quoting *Commonwealth v. Young*, 453 Mass. 707, 713 (2009) (when interpreting statutory language, we "start 'with the language of the statute itself and presume . . . that the Legislature intended what the words of the statute say'" [quotation omitted]). Considered on its own, this phrase conveys the Legislature's intent that offenders be punished by imprisonment. See *Commonwealth v. Montarvo*, 486 Mass. 535, 537 (2020) (interpreting habitual offender statute, G. L. c. 279, § 25 [§ 25]); *Commonwealth v. Zapata*, 455 Mass. 530, 535 (2009) (interpreting armed home invasion statute, G. L. c. 265, § 18C [§ 18C]). Indeed, we previously have acknowledged that "probation appears to be unavailable" where a statute contains such language and provides for no alternative sentence. *Montarvo*, *supra*. See *Zapata*, *supra* (such language "would suggest a legislative intent that a defendant convicted under the statute could be sentenced to only a term of incarceration, not probation").

In the course of explaining its new interpretive presumption, however, the court neither considers the plain meaning of the phrase "shall be punished by imprisonment" nor addresses the fact that we previously have acknowledged that

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plain meaning. Rather, the court takes the position that *Montarvo*, *supra*, and *Zapata*, *supra*, stand for the proposition that, in statutes that explicitly mandate imprisonment, the absence of a prohibition on probation creates ambiguity as to whether offenders may be sentenced to probation instead of imprisonment. *Ante* at . The court misconstrues these cases.

In both *Montarvo* and *Zapata*, we interpreted the statute at issue (§ 25 [a.] and § 18C, respectively) to permit probation in lieu of incarceration because either the history or the language of the statute made its facially plain command that offenders "shall be punished by imprisonment" ambiguous. See *Montarvo*, 486 Mass. at 537-538; *Zapata*, 455 Mass. at 535. We then resolved this ambiguity favorably to defendants pursuant to the rule of lenity. See *Montarvo*, *supra* at 542-543; *Zapata*, *supra*.

Contrary to the court's suggestion, in neither case was this ambiguity created by the mere absence of language prohibiting probation. *Ante* at, note 9. Rather, in *Zapata*, 455 Mass. at 535 n.7, the court considered the absence of such language significant only because "the unique legislative history" of § 18C made it so. Specifically, the Legislature's decision to remove such language from a previous version of § 18C created the ambiguity. *See id.*| at 531-535. Similarly, in *Montarvo*, 486 Mass. at 537-538, the court considered significant the absence of language prohibiting probation in § 25 (a.) only

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because such language was present in § 25 (b). It was the "juxtaposition" of § 25's simultaneously enacted subsections that made § 25 (a.) ambiguous, *id.* at 537, not the absence of language precluding probation in § 25 (a.) considered on its own.

The court suggests that *Montarvo* can be extended such that the Legislature's decision to include a prohibition on probation in some sentencing statutes should be considered evidence that the Legislature intended, conversely, that probation be available under any sentencing statute without a prohibition on probation. *Ante* at . However, the "maxim of negative implication, "[4] relied on (properly in my view) in *Montarvo*, generally is applied only to simultaneously enacted provisions within a single

statute, where one may assume that the Legislature considered the provisions together when it adopted the statutory language. *See Montarvo*, 486 Mass. at 538. *See also Lindh v. Murphy*, 521 U.S. 320, 330 (1997) ("negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted"). By contrast, little reasonably may be inferred about legislative

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intent from the absence of language in one sentencing statute that exists in some other sentencing statute, where the statutes were enacted at different times and concern different crimes.[5] Compare, e.g., *Gomez-Perez v. Potter*, 553 U.S. 474, 488 (2008) (rejecting reasoning from negative implication where disparate statutory provisions "were enacted separately and are couched in very different terms"); *Commonwealth v. Garvey*, 477 Mass. 59, 65 (2017) (likewise, "where the [sentencing] statutes . . . vary significantly" in "language and structure").

Notably, "[a]s with all aids for interpretation," the maxim of negative implication "is subordinate to the primary rule that legislative intent governs the interpretation of a statute." 2A N.J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47:23 (7th ed. 2014 & Nov. 2021 update) (Sutherland). See *Globe Newspaper Co., petitioner*, 461 Mass. 113, 119 (2011)

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(rejecting interpretation based on negative implication given absence of "evidence that the Legislature intended this result"). Because "the language of the statute" is "'the principal source of insight' into the intent of the Legislature," *Newberry*, 483 Mass. at 192, quoting *Sisson*, 460 Mass. at 708, the plain meaning of the language in the statute ordinarily should trump "negative implications" from language *not* in the statute. See Sutherland, *supra* at § 47:25 (maxim of negative implication "is an interpretive tool useful to remind courts *first to look only to a statute's literal language* to determine legislative intent" [emphasis added]).

Thus, the mere absence of a prohibition on probation does not overcome our default presumption that when the Legislature directs that offenders "shall be punished by imprisonment," it means exactly what it says. See *Williamson*, 462 Mass. at 679. Compare *Commonwealth v. Brown*, 431 Mass. 772, 775-776 (2000) (interpreting statute to impose twenty-year mandatory minimum sentence as plainly required by its language, notwithstanding absence in statute of language customarily used to impose mandatory minimum sentences). Whereas *Montarvo* and *Zapata* support the proposition that such facially clear language *may* be rendered ambiguous on careful examination of a statute's text, purpose, and history, see *Montarvo*, 486 Mass. at 537-542; *Zapata*, 455 Mass. at 531-535, they do not support the

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proposition that such facially clear language *presumptively* is ambiguous. This presumption, announced by the court today, is patently backward. See *Newberry*, 483 Mass. at 192; *Williamson*, *supra*. By ignoring the plain language of these sentencing statutes in a systematic way, the court encroaches upon the Legislature's authority "to establish criminal sanctions," raising "a serious question concerning the separation of powers." *Commonwealth v. Jackson*, 369 Mass. 904, 922 (1976). See *Ex parte Millbrook*, 304 So.3d 202, 205 (Ala. 2020) ("Adhering to the plain meaning of a statute ensures that this Court complies with its constitutional mandate . . . [to] say[] what the law is without overstepping its role and legislating from the bench"); *Senjab v. Alhulaibi*, 497 P.3d 618, 620 (Nev. 2021), quoting *ASAP Storage, Inc. v. Sparks*, 123 Nev. 639, 653 (2007) ("Statutes should be given their plain meaning whenever

possible; otherwise . . . the constitutional separation-of-powers doctrine is implicated").

I share the concern voiced by Justice Wendlandt, *post* at,,, and echoed by the court, *ante* at notes 15, 25, that mandatory minimum sentences risk unduly harsh penalties for any individual and contribute to the unjustly disproportionate rate of incarceration for Black and brown folks. But this concern no more enables this court to presume ambiguity where sentencing language is clear than it enables us to wholly ignore

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clear sentencing language. We are bound to interpret statutes to faithfully effectuate legislative intent, see *Commonwealth v. Gomes*, 483 Mass. 123, 127 (2019), even where we consider the Legislature's policy choice unwise or unjust, see *Commonwealth v. Laltaprasad*, 475 Mass. 692, 701-703 (2016).

Because the court's newly announced blanket presumption regarding the availability of probation results from an apparent misapplication of our case law and additionally may violate art. 30, I can endorse neither the presumption nor the application of it to § 178H (a.) (2) .[6] Accordingly, I concur in the court's answers to the reported questions, *ante* at, in its decision to overrule *Hines*, *ante* at, and in its disposal of the defendant's challenge to the constitutionality of § 178H (a.) (2), *ante* at . I cannot, however, join the rest of the opinion.

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WENDLANDT, J. (dissenting).

At a time when we are beginning to understand that statutes imposing mandatory minimum sentences are resulting in the disproportionate incarceration of Black and brown defendants in our Commonwealth, we ought not to further strip judges of discretion in sentencing. There can be no doubt that the court's decision to overrule *Commonwealth v. Hines*, 449 Mass. 183 (2007), does just that. While making "plain the meaning of certain language" in our own sentencing jurisprudence is an auspicious and laudable goal, *ante* at, on balance I believe it should yield to the principle of stare decisis, especially where (as here) fidelity to that principle is consistent with both legislative inaction in the face of our prior construction of sentencing statutes and our commitment to racial justice.[1] Accordingly, I dissent.

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To be sure, interpreting the phrase "for not less than" a specified number of years in an offense-specific statute to be the minimum term under the indeterminate sentencing statute, G. L. c. 279, § 24, [2] has an undeniable mathematical elegance.[3]And, if we were writing on a tabula rasa, the court's analysis presents perfectly persuasive, plain statutory construction. The court's attempt to carve a framework to instruct the Legislature as to how to implement mandatory minimum sentences in an area that has not been the beacon of clarity perhaps is admirable. *Ante* at . Still, I would not depart from our previous case-by-case approach from which certain standards

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emerge.[4] This has been the "settled" law to which stare decisis counsels fealty.

"Stare decisis -- in English, the idea that today's [c]ourt should stand by yesterday's decisions --is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015), quoting *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014). It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

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contributes to the actual and perceived integrity of the judicial process" (citation omitted). *Knick v. Scott*, 139 S.Ct. 2162, 2189 (2019) (Kagan, J.,

dissenting). To respect it "means sticking to some wrong decisions," on the justification that "it is usually 'more important that the applicable rule of law be settled than that it be settled right.'" *Kimble*, *supra*, quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

Stare decisis "carries enhanced force" in connection with our construction of a statute, where a decision "effectively become[s] part of the statutory scheme." *Kimble*, 576 U.S. at 456. The Legislature is, of course, free to amend a statute where it concludes that our construction of its intent is wrong. Instead of taking it upon ourselves to revisit our prior jurisprudence on the basis that we now think the prior court's reasoning is no longer persuasive, we should recognize that when it comes to matters of statutory construction "critics of our ruling can take their objections across the street, and [the Legislature] can correct any mistake it sees." *Id.* Here, we are faced squarely with a situation in which the Legislature can alter our prior holding and has not done so.

This last point ought to guide our decision in this case because, nearly fifteen years ago in *Hines*, we specifically addressed an offense-specific statute with precisely the same

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language as the one at issue in the present case; it provided that the defendant shall be sentenced "for not less than" a specified number of years in State prison and did not provide in addition a maximum sentence. See *Hines*, 449 Mass. at 191-192. We concluded that such language is ambiguous in light of the indeterminate sentencing statute, which requires a sentencing judge to set both a maximum term and minimum term in State prison. See note 2, *supra*. Accordingly, we held that, absent a statutory maximum term, the language "for not less than" a specified number of years did not preclude a judge from sentencing a defendant to a number of years in State prison that was less than the number set forth in such an offense-specific statute.[5] *Hines*, *supra*.

In so doing, we specifically distinguished the offense-specific statute that used the phrase "for not less than" a specified number of years but not did not specify a maximum term

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from the statute at issue in *Commonwealth v. Brown*, 431 Mass. 772, 776-777 (2000), that set forth both a minimum term and a maximum term. In other words, we rejected the very argument adopted by the court that "the presence or absence of a maximum term is irrelevant" to how we construe minimum term language. *Ante* at . See *Hines*, 449 Mass. at 191 n.4 (rejecting argument that statute that provided "for not less than" specified number of years is "essentially the same" as statute at issue in *Brown*, 431 Mass. at 776-777, which provided both maximum and minimum term using phrase "for not less than"). We expressly stated that the absence of a maximum term was dispositive. *See id.* (distinguishing statute in *Brown*, setting forth "two terms, both a maximum and a minimum term," from statute setting forth only that offender shall be punished "for not less than five years"). We also concluded that the absence of the phrase "shall not be reduced to less than" the specified number of years in the offense-specific statute bolstered our conclusion that "for not less than" the specified number of years did not strip the judge of sentencing discretion.[6] See *id.*

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Indeed, just two years ago, citing to *Hines*, 449 Mass. at 191-192, we confirmed unanimously that "for not less than five years" permits "[a] judge, for instance, [to] sentence a defendant to not less than two years and not more than five years." *Commonwealth v. Thomas*, 484 Mass. 1024, 1026 n.8 (2020) .

Today, the court overrules *Hines*, adopting the very same arguments we rejected in that precedential case.[7] See *ante*

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at . Reversing course, the court now holds that the phrase "for not less than" a specified number of years (even without a maximum term and without the additional language "shall not be reduced to less than," each of which we found so critical in *Hines*) sets the minimum term to which a judge, seeking to incarcerate a defendant, must sentence a defendant under the indeterminate sentencing statute.[8]

Of course, "[w]hat we can decide, we can undecide," *Kimble*, 576 U.S. at 465; however, where "the Legislature is presumed to be aware of judicial decisions that have consistently interpreted these statutes in the traditional fashion," *Brown*, 431 Mass. at 777, and yet has not changed the statute to reflect an intent contrary to our construction, I would not be so quick to alter course, upsetting recent, unanimous decisions. See, e.g., *Thomas*, 484 Mass. at 1026 n.8; *Commonwealth v. Rodriguez*, 482 Mass. 366, 370 n.3. (2019).

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Given the absence of legislative action in response to our case law, discussed *supra*, it is hardly a violation of art. 30 of the Massachusetts Declaration of Rights to refuse to abandon our jurisprudence in favor of stare decisis. See *ante* at note 25, . To the contrary, the absence of legislative action addressing our fifteen year old decision in *Hines* suggests the Legislature has continued to use the phrase "for not less than" a specified number of years (without additionally specifying a maximum term) to indicate precisely what we held it to mean in *Hines* -- neither a "minimum term" nor a "mandatory minimum term."[9] See *Kimble*, 576 U.S. at 456 (noting importance of stare decisis in connection with interpretation of statutes, where a decision "effectively become[s] part of the statutory scheme").

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Indeed, the Legislature revisited the very same offense-specific statute at issue in *Hines* in 2014 (seven years after our holding), and left unchanged the relevant "for not less than" language. See 2014 House Doc. No. 4376.[10] Just last year, we observed that such legislative inaction "is a strong indication that the Legislature approved of the court's statutory construction of [this] provision[]." *Commonwealth v. Bohigian*, 486 Mass. 209, 216 (2020). In doing so, we echoed the same observation made in 2007, the year *Hines* was decided. See *Commonwealth v. Colturi*, 448 Mass. 809, 812 (2007) (because we presume Legislature is aware of our prior decisions, "reenact[ment of] statutory language without material change" implies adoption of prior construction).

Significantly, the decision to overrule our 2007 decision in *Hines*, which we affirmed in 2019 in *Rodriguez*, and to overrule our 2020 decision in *Thomas*, see *ante* at, comes at a time when the available data show that stripping judges of discretion in sentencing has resulted in Black and brown defendants being disproportionately represented in the

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Commonwealth's population of incarcerated people.[11] Just last term, the Criminal Justice Policy Program at Harvard Law School issued a report, concluding that mandatory minimum sentences are a dominate cause of the stark discrepancies between outcomes for white defendants and those for Black and brown defendants.[12]

The court correctly notes that, "[w]here the reasons for departing from precedent outweigh the factors that favor adherence to it, we can and should acknowledge our past mistakes and cease perpetuating them." *Ante* at, citing *Franklin v. Albert*,

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381 Mass. 611, 617 (1980) . See *Franklin*, *supra* at 617-619 (overruling prior case law regarding accrual for purposes of statute of limitations applicable to medical malpractice actions). In doing so in *Franklin*, however, we were guided by the "manifest injustice" of continuing to abide by the prior decision. *Id.* at 618 (revisiting prior rule on ground that it was manifestly unjust to permit statute of limitations to run before "blameless" patient reasonably could know of injury) . We stated, "This court is not barred from departing from [the prior] rule if persuaded that the values in so doing outweigh the values underlying stare decisis." *Id.* at 617. Here, unlike in *Franklin*, the value of racial justice to which we all should be committed and the value of stare decisis coincide. We need not abandon the latter to achieve the former.[13]

The court's decision to overrule *Hines* further strips judges of sentencing discretion, requiring judges to choose between probation and a State prison term "for not less than" the prescribed number of years, "offering a sentencing judge in some cases a Hobson's choice between probation and a mandatory

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term of [a prescribed number of] years in prison." *Commonwealth* v. Montarvo, 486 Mass. 535, 542 (2020).[14] The panoply of choices previously available under our sentencing jurisprudence is now much more constrained.

In light of the foundational significance of stare decisis in connection with our decisional law construing statutes, as well as the Legislature's inaction to correct any perceived misconstruction of its intent, and because we ought not be blind to the impact of today's "clarifications" on Black and brown defendants, I dissent.

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Notes:

[1] General Laws c. 6, § 178H (a.), provides in relevant part: "A sex offender required to register pursuant to this chapter who knowingly: (i) fails to register; (ii) fails to verify registration information; (iii) fails to provide notice of a change of address; or (iv) who knowingly provides false information shall be punished in accordance with this section."

General Laws c. 6, § 178H (a) (2) (§ 178H [a] [2]), provides in relevant part: "A second and subsequent conviction under this subsection shall be punished by imprisonment in the [S]tate prison for not less than five years."

[2] This lack of clarity was also recently observed in a Boston Bar Journal article on this court's sentencing jurisprudence related to mandatory minimum sentences, with the author titling one section, "Confusing Cases, Confusing Law." Cohen, Careful Scrutiny: The SJC and Mandatory Sentencing Laws, 65 Boston Bar J. (Summer 2021), *https://bostonbarjournal.com* /2 021/0 6/2 8/careful-scrutiny-the-sj c-and-mandatory-sentencing -laws [*https://perma.cc/6BNV-XY9F*].

[3] While we do not today announce a new rule regarding the construction of mandatory minimum sentences, as urged by amicus Massachusetts Association of Criminal Defense Lawyers, the clarifications discussed underscore that this court has required and continues to require the Legislature to use unambiguous language before we can conclude that a mandatory minimum sentence has been created.

[4] Offense-specific statutes that use the word "mandatory" generally refer to a "mandatory minimum term of imprisonment" rather than a "mandatory minimum sentence." See, e.g., G. L. c. 265, § 43 (b); G. L. c. 94C, § 32K; G. L. c. 265, § 13D; G. L. c. 269, § 10E (2), (3). However, the Legislature has referred to a "mandatory minimum term of imprisonment" as a "mandatory minimum sentence." Compare G. L. c. 94C, § 32 (b) ("No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of [three and one-half] years . . ."), with G. L. c. 94C,

§ 32 (c0 (discussing parole eligibility of "[a]ny person serving a mandatory minimum sentence for violating any provision of this section"). Thus, we understand the phrases "mandatory minimum term of imprisonment" and "mandatory minimum sentence" generally to be interchangeable. Additionally, where the Legislature variously uses the term "mandatory minimum term of imprisonment," see statutes cited *supra*, and "minimum term," see, e.g., G. L. c. 127, § 129D (d); G. L. c. 127, § 133; G. L. c. 127, § 133A; G. L. c. 279, § 26, logic and our rules of statutory construction lead to the conclusion that there is a distinction between a minimum term and a mandatory minimum term of imprisonment or mandatory minimum sentence, see *Commonwealth v. Montarvo*, 486 Mass. 535, 538 (2020) (express prohibition on probation in one statutory provision and absence of such prohibition in another lead to conclusion that, under first provision, probation is prohibited and, under second provision, it is not); *City Elec. Supply Co.* v. *Arch Ins. Co.*, 481 Mass. 784, 788-789 (2019) ("When interpreting the absence of language in an otherwise 'detailed and precise [statute], we regard [an] omission as purposeful'" [citation omitted]).

[5] For example, this court previously has referred to the five-year minimum term discussed in § 178H (a.) (2) as, at different times, a "minimum" and a "mandatory minimum." Compare *Commonwealth v. Wimer*, 480 Mass. 1, 6 n.5 (2018) ("minimum sentence"), with *Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd.*, 473 Mass. 297, 306 (2015) ("mandatory minimum sentence"). In *Commonwealth v. Brown*, 431 Mass. 772, 775 (2000), this court referred to the twenty-year minimum term in G. L. c. 265, § 18C, as a "mandatory minimum." Later, while still referring to the twenty-year minimum term as a "mandatory minimum," we held that such term was, in fact, not mandatory where probation was allowed as an alternative sentence. *Commonwealth v. Zapata*, 455 Mass. 530, 535 (2009).

[6] Sentences of incarceration in State prison must be indeterminate. G. L. c. 279, § 24 (§ 24). As applied to an indeterminate sentence, the minimum term defined in the offense-specific statute serves as the shortest length of time that may be set as the lower end of a sentence expressed as a range consistent with § 24. Thus, if a judge chooses to sentence a defendant to incarceration, the phrase "minimum term" refers to the shortest length of time to which the defendant may be sentenced, whether that length of time is imposed as a fixed, determinate sentence or as the lower end of a sentence expressed as a range.

[7] It has been suggested that the sentencing guidelines permit a judge to impose a sentence of incarceration for a term that is shorter than the statutorily defined minimum term. See Robina Institute of Criminal Law and Criminal Justice, Jurisdiction Profile: Massachusetts 9 n.34 (updated Apr. 2017); Massachusetts Sentencing Commission, Sentencing Guide 18 (Feb. 1998). See also Massachusetts Sentencing Commission, Advisory Sentencing Guidelines 59, 151 (Nov. 2017) (although "[s]entences that depart from mandatory minimum sentences of incarceration prescribed by statute are prohibited by the Guidelines," minimum term in G. L. c. 6, § 178H [a.] [1], not designated as "mandatory," suggesting "minimum terms" are distinct from mandatory minimum sentences and downward departure is allowed in case of minimum terms).

The sentencing guidelines "shall take effect only if enacted into law" by the Legislature. *Commonwealth v. Russo*, 421 Mass. 317, 322 (1995). G. L. c. 211E, § 3 (a) (1). Therefore, although G. L. c. 211E, § 3 (e_), provides that "the sentencing judge may depart from the range established by the sentencing guidelines and impose a sentence below any mandatory minimum term prescribed by statute," that section "is appropriately construed to mean that the authority to depart from mandatory minimum sentences set by statute was not intended to operate independently of sentencing guidelines recommended by the commission, and the guidelines themselves must be enacted by the

Legislature before they take effect." *Commonwealth v. Laltaprasad*, 475 Mass. 692, 701 (2016), quoting G. L. c. 211E, § 3 *(e)* . No sentencing guidelines proposed by the Sentencing Commission have yet been enacted by the Legislature. See Laltaprasad, *supra* at 693. See House Bill No. 1731 (Jan. 13, 2021) (proposed legislation). Therefore, "a sentencing judge currently may not impose a sentence that departs from the prescribed mandatory minimum" sentence or minimum term. *Laltaprasad*, *supra*.

[8] Section 24 provides in relevant part:

> "If a convict is sentenced to the [S]tate prison, except as [a] habitual criminal, the court shall not fix the term of imprisonment, but shall fix a maximum and a minimum term for which he [or she] may be imprisoned. The maximum term shall not be longer than the longest term fixed by law for the punishment of the crime of which he [or she] has be[en] convicted, and the minimum term shall be a term set by the court, except that, where an alternative sentence to a house of correction is permitted for the offense, a minimum [S]tate prison term may not be less than one year. In the case of a sentence to life imprisonment, except in the case of a sentence for murder in the first degree, and in the case of multiple life sentences arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, the court shall fix a minimum term which shall be not less than [fifteen] years nor more than [twenty-five] years."

[9] Over the years, we have referred to the minimum term in G. L. c. 265, § 18C, as a "mandatory minimum" sentence. See *Commonwealth v. Lutskov*, 480 Mass. 575, 583 (2018); *Zapata*, 455 Mass. at 535; *Brown*, 431 Mass. at 775. However, we held in *Zapata* that probation was allowed as an alternative sentence under § 18C. *Zapata*, *supra*. Thus, § 18C does not impose a true "mandatory minimum sentence" as we define that term today. Our holding in *Zapata* leads to the same conclusion as to other statutes that provide for a sentence of "imprisonment . . . for life or for any term of not less than" a certain number of years but that do not expressly prohibit probation. In light of *Zapata*, such language, on its own, creates only a minimum term.

[10] The 1993 "truth-in-sentencing" act eliminated the availability of suspended sentences for sentences of incarceration in State prison. G. L. c. 127, § 133, as appearing in St. 1993, c. 432, § 11. However, because that act only speaks to State prison sentences, a sentence of incarceration in a house of correction still may be suspended.

[11] If the Legislature disagrees with this interpretation, it is free to amend or enact new statutes clarifying the meaning of "mandatory minimum sentence."

[12] The bill provided in relevant part that a convicted defendant "shall be punished by imprisonment in the [S]tate prison for not less than twenty-five years. Any sentence so imposed shall not be suspended, nor shall any person so convicted be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct. Prosecution under this section shall neither be continued without a finding nor placed on file by the court." *Opinion of the Justices*, 378 Mass. 822, 823 (1979), quoting Senate Bill No. 777 (1979) .

[13] Consistent with this plain language understanding, where the word "mandatory" is used to describe the term of imprisonment required by an offense-specific statute, we have not hesitated to determine that such statute calls for a mandatory minimum sentence. See, e.g., *Commonwealth v. Ehiabhi*, 478 Mass. 154, 155 & n.2 (2017) (interpreting G. L. c. 94C, § 32A [b] and [d], as amended through St. 2012, c. 192, §§ 13, 14, which provided for "mandatory minimum

term[s] of imprisonment," as imposing mandatory minimum sentences).

[14] As the Legislature's working definition of "mandatory minimum sentence" appears to incorporate, but is not equivalent to, a "minimum term," such definition also reveals that the Legislature understands "minimum term" to be a sentencing concept distinct from "mandatory minimum sentence."

[15] Because a mandatory minimum sentence eliminates judicial and executive discretion in sentencing, represents one of the harshest types of penalties the Legislature can impose, and, as discussed by the dissent, *post* at, has been found to lead to racial disparities in incarcerated populations, this court long has been hesitant to find that a statute imposes a mandatory minimum sentence unless the Legislature uses the clearest of language indicating its intent to create such penalty. See, e.g., *Zapata*, 455 Mass. at 534-535.

Where, as here, a minimum term provides a judge with the discretion to sentence a defendant to probation and presumably provides the Department of Correction with the discretion to reduce an inmate's sentence to less than the minimum term, the same hesitation does not apply. We conclude that the plain language of the statute and *Brown*'s instruction that "[l]anguage such as this has always been interpreted in the same manner: the 'not less than' phrase denotes a minimum sentence. ... It is always the shortest sentence that can be imposed, the number of years that determines parole eligibility," are dispositive here. *Brown*, 431 Mass. at 777, 779.

[16] The definitions and clarifications discussed are intended to operate as default understandings of this court. We do not foreclose the possibility that any term may have a different meaning in a specific context not identified here.

[17] Contrary to the concurrence's assertion, *post* at, we have reached this conclusion through a comprehensive review of existing statutory language and an effort to effectuate legislative intent, fully consistent with both our rules of statutory interpretation and our obligations under art. 30 of the Massachusetts Declaration of Rights. We cannot interpret each sentencing statute as if in a silo, isolated from all other sentencing statutes -- many of which we have found to be drafted from identical or nearly identical component language. As with our interpretation of "mandatory minimum," if the Legislature disagrees with this interpretation, it is free to amend or enact new statutes clarifying when probation is or is not available as an alternative sentence to incarceration.

[18] The defendant argues that the rule of lenity counsels a different conclusion, requiring us to hold that where a statute requires a sentence of "not less than" a certain number of years, a judge nevertheless has discretion to sentence a defendant to less than that number. Because the rule of lenity applies where we "are unable to ascertain the intent of the *Legislature*" (emphasis added; citation omitted), *Montarvo*, 486 Mass. at 542, where the language of a statute is plain but the *courts* have created ambiguity through inconsistent case law, the rule of lenity is inapplicable. Thus, because the language of § 178H (a.) (2) is plain, the rule of lenity does not apply. We must effectuate the clear intent of the Legislature to impose a sentence of incarceration of "not less than" a designated number of years.

[19] While we previously have concluded that language such as "for life or a term of not less than" a certain number of years created a mandatory minimum sentence, see *Brown*, 431 Mass. at 774-776, we since have clarified that such language, without additional express prohibitions on probation, parole, suspensions, and sentence-reducing mechanisms, merely creates a minimum term and not a mandatory minimum sentence, as we now define those terms, see *Zapata*, 455 Mass. at 531.

[20] If the statute defines a minimum term of incarceration, maximum term language may appear as "not more than," "nor more than," "or more than," or "life or." For example, it may appear as "shall be punished by a term of imprisonment in the [S]tate prison for not less

than five nor more than fifteen years," G. L. c. 94C, § 32F (a.) (distribution of controlled substances to minors), or "shall be punished by imprisonment in the [S]tate prison for life or for any term of not less than twenty years," G. L. c. 265, § 18C (home invasion).

[21] While "the Legislature 'is not restricted to one means of expression' in establishing a sentencing scheme," *Zapata*, 455 Mass. at 534, quoting *Brown*, 431 Mass. at 776, we note that, pursuant to the rule of lenity, we interpret ambiguous statutory language in the defendant's favor, *Montarvo*, 486 Mass. at 542.

[22] The defendant argues in his brief that G. L. c. 6, § 178H (a.), does not carry a five-year mandatory minimum State prison sentence.

[23] The remaining portion of § 178H (a.) (2), imposing community parole supervision for life on certain offenders, has been invalidated as unconstitutional. *Commonwealth v. Cole*, 468 Mass. 294, 295, 308-309 (2014).

[24] We also note that, because § 178H (a.) (2) contains no language prohibiting sentence deductions, such deductions are presumably available. Therefore, § 178H (a.) (2) also does not impose a mandatory minimum sentence because a defendant sentenced thereunder presumably may take advantage of any available sentence deductions such that he or she may serve less than the full minimum term of the sentence imposed by the judge.

[25] While we share the dissent's concern about the racial disparities in our incarcerated populations, we note that we do not today create a new sentencing concept of "minimum term." Rather, we clarify judicially created ambiguities in the law to render our jurisprudence consistent with the plain language utilized by the Legislature, as our rules of statutory construction require us to do. While we agree that we should be hesitant to remove the discretion of sentencing judges at this time, see *post* at, our decision today merely reflects the *Legislature's* intent to do just that. The result in this case is compelled by the plain language employed by the Legislature in § 178H (a.) (2) . As "it is the [L] egislature, not the [c]ourt, which is to define a crime, and ordain its punishment," *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820), it is also the domain of the Legislature to determine what, if any, discretion a sentencing judge has. It would violate the fundamental principle of separation of powers to rewrite § 178H (a.) (2) as the dissent wishes us to do. See art. 30 of the Massachusetts Declaration of Rights.

We also observe that, where § 178H (a.) (2) imposes only a minimum term and not a mandatory minimum sentence, a judge presumably has the discretion to sentence a defendant to probation. Thus, on remand, the sentencing judge here could decide that, where he had wanted to sentence the defendant to a term of from one to two years of incarceration, a minimum term of five years would be too harsh; in such an event, the judge could sentence the defendant to probation.

[26] It has been suggested that interpreting § 178H (a.) (2) to allow for the imposition of probation or a term of incarceration of not less than five years creates a Hobson's choice. To the extent that this argument carries any weight, we note that the choice available under § 178H (a.) (2) is far less severe than that under G. L. c. 279, § 25 (a.) (habitual offenders), which may require a judge to choose between imposing probation or a term of incarceration of not less than twenty years, *Montarvo*, 486 Mass. at 542-543, or that under G. L. c. 265, § 18C (home invasion), which always so requires, *Zapata*, 455 Mass. at 535. The Legislature is free to establish such a sentencing structure.

[27] It would be illogical for the Legislature to enact offense-specific statutes with offense-specific minimum terms relating to incarceration in State prison if it expected all such minimum terms to mean only that the designated offense is a felony, and the specifics of such terms should be ignored in favor of the one-year minimum term provided in § 24. Such a construction of our statutory sentencing scheme would render the "not less than five years" language in § 178H (a.)

(2) inoperative and lead to just such an illogical result. Because we do not interpret statutes in such a way that parts are "inoperative or superfluous" or that creates an illogical result, § 24 is to be applied in conjunction with any minimum term or mandatory minimum sentencing language contained in the relevant offense-specific statute at issue. *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004), quoting *Bankers Life & Cas. Co.* v. *Commissioner of Ins.*, 427 Mass. 136, 140 (1998). See *Brown*, 431 Mass. at 774; *Commonwealth v. Logan*, 367 Mass. 655, 657 (1975).

[28] In *Commonwealth* v. Marrone, 387 Mass. 702, 706-707 (1982), this court invalidated a statute that similarly imposed a determinate State prison sentence but that did not provide any language suggesting that such sentence might be reduced. In such a case, we determined that "it would be sheer conjecture . . . to conclude that the Legislature meant the fifteen-year term to be either the maximum term or the minimum term" of an indeterminate sentence. *Id.* at 704.

[29] General Laws c. 269, § 10 (m), provides in relevant part:

> "[A]ny person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid license to carry firearms . . . shall be punished by imprisonment in a [S]tate prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under [G. L. c. 140, § 129B,] shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed under this paragraph. The sentence imposed on such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence .... Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file."

The sole difference between the current version of the statute, quoted here, and the version at issue in *Rodriguez* is that the earlier version referred to "a valid Class A or Class B license to carry firearms," whereas the current version refers to "a valid license to carry firearms." Compare G. L. c. 269, § 10 (m), inserted by St. 1998, c. 180, § 70, with G. L. c. 269, § 10 (m), as amended through St. 2014, c. 284, § 91 (effective Jan. 1, 2021). The difference does not affect our analysis or that of the *Rodriguez* court.

[30] Although the *Rodriguez* court characterized the term of imprisonment language as creating "two different mandatory minimum sentences," *Rodriguez*, 482 Mass. at 370 n.4, in light of our discussion today it is more accurate to characterize the first provision of G. L. c. 269, § 10 (m), as setting forth a minimum term rather than a mandatory minimum sentence. However, because we conclude today that a judge lacks discretion to impose a sentence below a specified minimum term even where such minimum term is not part of a mandatory minimum sentence, the characterization does not affect the *Rodriguez* court's analysis.

[31] The analysis in *Rodriguez* was tied to a statutory structure that this court has described as "vexing," being "no grammatical paragon," and "caus[ing] courts some consternation." *Rodriguez*, 482 Mass. at 368, and cases cited. We have not found this statutory structure replicated

elsewhere among our sentencing statutes. Absent another similarly constructed statute, we think *Rodriguez* has little applicability beyond G. L. c. 269, § 10 (m).

[32] The dissent asserts that, where the Legislature made an amendment to G. L. c. 265, § 18B, in 2014 but left unchanged the "not less than" language, the Legislature has approved of the court's opinion in *Commonwealth v. Hines*, 449 Mass. 183 (2007). *Post* at . However, because we have, at various times prior to 2014, interpreted "not less than" language as being essentially inoperative, e.g., *Hines*, 449 Mass. at 191-192, or, conversely, as establishing a mandatory minimum sentence, e.g., *Brown*, 431 Mass. at 775, there was no clear prior construction of that language for the Legislature to reenact. Further, the "not less than" language in the statute at issue in *Brown* was also reenacted after our decision was issued in that case, see St. 2004, c. 150, § 17.

[33] Statutes containing minimum terms that would be rendered obsolete include, among others, G. L. c. 265, § 18B (unlawful possession of firearm while in commission of felony); G. L. c. 269, § 101 (c0 (transporting firearm into Commonwealth that causes death of another); G. L. c. 265, § 21A (armed assault with intent to steal motor vehicle); G. L. c. 265, § 13H 1/2 (d) (indecent assault and battery by law enforcement, first offense); G. L. c. 266, § 17 (armed breaking and entering); G. L. c. 6, § 178H (a.) (2) (failure to register as sex offender, subsequent offense); G. L. c. 272, § 35A (lascivious acts with child under sixteen, subsequent offense); G. L. c. 265, § 13F (indecent assault and battery on person with intellectual disability, first offense); G. L. c. 266, § 18 (armed home invasion); G. L. c. 265, § 26 (armed kidnapping); G. L. c. 265, § 18 (a.) (armed assault on elderly person with intent to rob or murder); G. L. c. 265, § 17 (armed robbery); G. L. c. 265, § 18A (armed assault in dwelling house); G. L. c. 265, § 24 (armed assault with intent to rape); G. L. c. 265, § 22 (b) (armed rape) .

[34] The dissent similarly fails to reconcile the court's conclusion in *Thomas* with the clear statement in *Brown* that such a reading of the statute is "in direct conflict with the plain language of the statute." See *post* at; *Brown*, 431 Mass. at 775.

[35] The dissent similarly asserts that we previously have rejected the argument that the presence or absence of maximum term language does not affect how we construe minimum term language, citing *Hines*, 449 Mass. at 191 n.4. *Post* at . As discussed *supra*, *Hines* was wrongly decided and is now overruled.

[36] As discussed *supra*, the statute at issue in *Brown*, G. L. c. 265, § 18C, imposes a minimum term and not a mandatory minimum sentence, as we define those terms today.

[1] By "minimum term" I refer to the lower number of a State prison sentence expressed as a range in accordance with G. L. c. 279, § 24.

[2] The court asserts that it must address the availability of probationary sentences to clear up confusion caused by purported deficiencies in our case law. *Ante* at . However, apart from conclusory assertions, the court points to no evidence of confusion on this point. Indeed, here, the judge sentenced the defendant to probation for a separate violation of § 178H (a.) (2) without expressing uncertainty or concern about its legality. Nor was the sentence challenged by the Commonwealth. As for our case law, I am aware of no deficiencies in our interpretation of sentencing statutes aside from *Hines*, which created uncertainty regarding only how short the minimum term of a prison sentence could be pursuant to § 178H (a.) (2) . Having overruled *Hines*, the court has eliminated the root of any confusion and fully resolved the reported questions.

[3] The court explains at length its use of the phrases "minimum term" and "mandatory minimum sentence." *Ante* at The court expends such effort partly because it perceives inconsistency in how we have used the label "mandatory minimum" in the past. *Id.* at,, note 5. But the court identifies no substantive problems with our sentencing jurisprudence flowing from this "inconsistency." As to the "inconsistency"

itself, the minor variations in language upon which the court focuses -- i.e., whether the word "mandatory" is used when describing sentencing restrictions that obviously are mandatory -- are innocuous reflections of the fact that the same thing can be said in multiple ways. The court's attempt to ensure that "mandatory minimum" means always, and only, what it here defines that term to mean will generate more confusion than clarity in the interpretation of our sentencing jurisprudence moving forward.

[4] See *Halebian v. Berv*, 457 Mass. 620, 628 (2010) (maxim of negative implication stands for proposition "that the express inclusion of one thing implies the exclusion of another").

[5] Although it is true that we construe related statutes together such that they form "a harmonious whole consistent with the legislative purpose," *Commonwealth v. Donohue*, 452 Mass. 256, 266-267 (2008), quoting *Board of Educ.* v. *Assessor of Worcester*, 368 Mass. 511, 513-514 (1975), see *ante* at, this principle directs that we interpret statutes such that they are substantively consistent and aligned with the underlying legislative purpose. The court has not identified a uniform legislative purpose underlying all sentencing statutes, let alone one that would require us to depart from a plain language reading of statutes requiring that offenders "shall be punished by imprisonment" without mentioning probation. Nor has the court explained why a plain language interpretation of such statutes renders our various sentencing statutes substantively inharmonious with one another.

[6] As noted *supra*, I would not reach the issue. Were the question of the availability of probation under § 178H (a.) (2) before us, it is quite possible that the mention of "release from probation" in the statute as enacted would render the legislative intent with respect to the availability of probation ambiguous, leading to the application of the rule of lenity. See *Montarvo*, 486 Mass. at 542; *Zapata*, 455 Mass. at 535. But a close analysis of the statute would be required to be sure.

[1] See Statements by Supreme Judicial Court Chief Justice Ralph D. Gants and Trial Court Chief Justice Paula M. Carey in Response to the Release of Harvard Law School's Report on Racial Disparities in the Massachusetts Criminal Justice System (Sept. 9, 2020), *https://www.mass.gov/news/statements-by-supreme-judicial-court-chief-justice-ralph-d-gants-and-trial-court-chief-justice* [*https://perma.cc/JX2W-6PJY*] (describing "Racial Disparities in the Massachusetts Criminal System" report, see note 9, *infra*, as a "'must read' for anyone who is committed to understanding the reasons for [racial] disparities and taking action to end them"); Gants & Carey, Creating Courts Where All Are Truly Equal, 65 Boston Bar J. 4, 4 (Winter 2021) (reiterating call to "recommit ourselves to the systemic change needed to make equality under the law an enduring reality for all" in wake of killing of George Floyd and subsequent social unrest).

[2] The indeterminate sentence statute dates back to 1895. See *Commonwealth* v. Marrone, 387 Mass. 702, 706 & n.7 (1982) (setting forth history of statute). In its present form, it provides, in relevant part:

> "If a convict is sentenced to the [S]tate prison, except as [a] habitual criminal, the court shall not fix the term of imprisonment, but shall fix a maximum and a minimum term for which he [or she] may be imprisoned. The maximum term shall not be longer than the longest term fixed by law for the punishment of the crime of which he [or she] has be[en] convicted, and the minimum term shall be a term set by the court, except that, where an alternative sentence to a house of correction is permitted for the offense, a minimum [S]tate prison term may not be less than one year."

G. L. c. 279, § 24.

[3] As the court acknowledges, even the "minimum term" set by a sentencing judge may not be the minimum term actually served by the defendant in light of other sentencing reduction schemes, such as good time credits, when available. *Ante* at

[4] These standards include the following. First, the Legislature can require a judge to sentence a defendant to a mandatory minimum term by using the words "mandatory" and "minimum" in the offense-specific statute. See *Commonwealth v. Lightfoot*, 391 Mass. 718, 721 (1984); *Marrone*, 387 Mass. at 704. See also *Commonwealth v. Brown*, 431 Mass. 772, 775-776 (2000). Second, the Legislature can set forth a mandatory minimum term by stating that (i) the sentence imposed "shall not be reduced to less than" a specified number of years "nor suspended"; (ii) once convicted, a defendant shall not "be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served" that same number of years; and (iii) the prosecution shall not "be continued without a finding nor placed on file." *Lightfoot*, *supra* at 719 n.l, 721, quoting G. L. c. 272, § 7. Third, where a statute sets forth both a minimum sentence and a maximum sentence and specifies that the minimum sentence is "not less than" a specified number of years, the sentence cannot be for "less than" that specified number of years. See *Brown*, *supra* at 776-777. Fourth, as set forth *infra*, we have told the Legislature that the phrase "for not less than" a specified number of years, without also specifying a maximum term or including the words "shall not be reduced," is ambiguous and will not strip the judge of discretion to sentence the defendant for less than the specified number of years. See *Hines*, 449 Mass. at 191 n.4. See also *Commonwealth v. Thomas*, 484 Mass. 1024, 1026 n.8 (2020).

[5] Instead, we construed the language -- "for not less than" a specific number of years "in the [S]tate prison" -- to mean that the offense was a felony. *Hines*, 449 Mass. at 191, citing *Lightfoot*, 391 Mass. at 721 (rejecting contention that offense-specific statute stating that offender "shall ... be punished [in the State prison] for not less than five years" required minimum term of five years and concluding instead that "[b]y imposing a State prison sentence, the Legislature provided that a violation of [the statute] would constitute a felony"). See *Lightfoot*, *supra* at 721-722, quoting *Commonwealth v. Hayes*, 372 Mass. 505, 511 (1977) ("The reference to State prison 'may well indicate the Legislature's use of the statutory shorthand for a felony . . .'").

[6] Specifically, we distinguished an offense-specific statute that prescribed a sentence in State prison "for not less than" five years from one that provided that the offender "shall be punished by imprisonment in the state prison for [twenty] years. Said sentence shall not be reduced to less than ten years . . . ." *Hines*, 449 Mass. at 191 n.4. The absence of "shall not be reduced," we held in *Hines*, permitted a judge to sentence a defendant to less than five years despite the language "for not less than" five years. *Id.*

[7] By contrast, we have justified overruling prior decisions when we have been presented with *new* arguments, not previously considered. Thus, in *Sheehan v. Weaver*, 467 Mass. 734 (2014), we addressed a statute imposing strict liability on the owner of a building for injuries caused by "any" building code violations. *Id.* at 738-739. We had previously concluded that the statute reached only code violations concerning fire safety. *Id.* at 739, citing *McAllister v. Boston Hous. Auth.*, 429 Mass. 300, 304 n.5 (1999). In the precedential case, however, we mistakenly relied on our construction of a prior version of the statute expressly limiting the owners' liability to fire code violations. *Sheehan*, *supra* at 739-740 (noting *McAllister* decision's reliance on pre-amendment case law). It was significant in our estimation that, in the precedential case, the court did not address the effect of the amendment and the parties did not bring the amendment to the court's attention. *Id.* at 740 n.8 & 741. See *Franklin v. Albert*, 381 Mass. 611, 617 (1980) (noting prior case law being overturned "nowhere elucidated or sought to balance" argument then being considered). In overruling the prior case, we did not, as the court does here, adopt an argument we had previously considered and rejected. Instead, we reached that precedential

decision "without the benefit of the vigorous advocacy on which the adversary process relies." *Sheehan*, *supra* at 740 n.8, quoting *Commonwealth v. Rahim*, 441 Mass. 273, 284 (2004). As one of the cases relied on by the court now, and authored by a unanimous court just a few years ago, acknowledges, "[o]verruling precedent requires something above and beyond mere disagreement with its analysis." *Shiel v. Rowell*, 480 Mass. 106, 109 (2018).

[8] *Hines* specifically distinguished *Brown* on the basis that the statute at issue in *Brown* contained both a maximum and minimum sentence, consistent with the indeterminate sentence statute. *Hines*, 449 Mass. at 191 n.4. In the court's current estimation, that basis is no longer "compelling," see *ante* at; yet, mere disagreement with yesterday's court's reasoning does not provide a basis for overruling it today, especially where, as here, the Legislature has not seen fit to do so.

[9] I disagree with the court's conclusion that reliance interests are "relatively low" because this case does not involve property or contract interests, *ante* at; in my view, a criminal defendant's liberty interests are as worthy of consideration, if not more. Any assessment of the extent to which "parties have ordered their affairs" in reliance on our case law needs, at the least, to consider any and all instances where a prosecutor, defense counsel, or trial judge (each bound by our holding in *Hines*) has made critical charging decisions, negotiated plea deals, and sentenced defendants. Given that only two percent of criminal cases go to trial, and we see only a very small fraction of those cases on appeal, the court's dismissal of reliance interests as "low" is unsupported. See E. Tsai Bishop, B. Hopkins, C. Obiofuma, & F. Owusu, Criminal Justice Policy Program, Harvard Law School, Racial Disparities in the Massachusetts Criminal System 61 (Sept. 2020) (Bishop et al.), *https://his.harvard.edu/content/uploads/2* 02 0/11 /Massachusetts-Racial-Disparity-Report-FINAL.pdf [*https://perma* .cc/W5KA-MX3R].

[10] The court's dismissal of this legislative inaction rests on its rejection today of the distinction we drew in *Hines* between a statute that uses the words "for not less than" and the statute in *Brown* that set both a minimum and maximum term. See *ante* at note 32.

[11] The Massachusetts Sentencing Commission reported that, in 2014, Massachusetts imprisoned Black and Latinx people at rates that substantially outpaced national averages. Massachusetts Sentencing Commission, Selected Race Statistics 2 (Sept. 27, 2016) (finding that in Massachusetts, Black people were incarcerated at nearly eight times the rate of whites, and Hispanic people were incarcerated at nearly five times the rate of whites, compared to national rates of 5.8 times the rate of whites and 1.3 times the rate of whites, respectively). See Bishop et al., *supra* at 4, citing A. Nellis, The Sentencing Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons 17 (2016), *https://www.sentencingproject.org/wp-*content/uploads/2 021/10/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons-2016.pdf [https://perma.cc/3QT3-RVJ8] ("A 2016 report from The Sentencing Project comparing racial and ethnic disparities in incarceration rates across all 50 states ranked Massachusetts the highest in disparities for Latinx people and the 13th highest for Black people").

[12] See Bishop et al., *supra* at 59 ("[C]ases involving offenses that carry mandatory and statutory minimum sentences contribute to the disparities we see in incarceration length for people of color. Defendants of color are more likely to face charges that carry mandatory incarceration time, and these more serious and high-risk sentencing possibilities translate into plea deals that are more likely to involve incarceration and longer sentences").

[13] To the extent the Legislature values imposition of minimum terms or mandatory minimum terms for specific offenses despite the resulting disparities, we have told it how to do so, see note 4, *supra*; *Hines* precludes neither such legislative

action nor the Legislature's considered judgment of the available data on the effect of such sentences on racial justice.

[14] This case provides an example of the further restrictions the court's holding places on judges' discretion. The trial judge here concluded that the appropriate sentence for this defendant was from one to two years; now, he cannot impose this sentence. The statute in *Hines*, G. L. c. 265, § 18B, now suddenly imposes a mandatory minimum term for second or subsequent offenders. For a nonexhaustive list of other statutes that will now strip judges of sentencing discretion, see *ante* at note 33.
