

THE CALAMITY OF SENTENCING IN VIRGINIA

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In this essay, Danny Ray Thomas discusses the use of discretionary sentencing guidelines in Virginia, arguing for reform of a section of the code that bars judicial review of departure from the guidelines without explanation.

To the layman, when you hear “sentencing guidelines,” you believe you’re hearing exactly what is meant to be understood as “sentencing guidelines.” However, as the old saying goes, “the devil is in the details”: the devil being the word “discretionary.”¹ Although the guidelines are considered “discretionary,” they should still have great influence on the sentencing of a defendant, if for no other reason than the fact that judges have three options to choose from: a low, medium, and high end guideline.²

A great level of detail is placed on creating guidelines and a myriad of factors are considered according to each individual. These factors include criminal history or lack thereof.³ You would think that the guidelines are essential in the sentencing process of judges, but the greater question is: why are judges so willing to exceed them simply because the statute gives them the flexibility to do so?⁴ I’m certain there’s at least a modicum of ego involved in their decision, although I am most certainly sensitive to the victims of crime and the impact of crime on their lives.

There is law on this matter in the form of Virginia Code 19.2-298.01.⁵ In particular, subsection (F) explains: “The failure to follow any or all of the provisions of this section or the failure to follow any or all of the provisions of this section in the prescribed manner shall not be reviewable on appeal or the basis of any other post-conviction relief.”⁶

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His motivation is reflective of the words Antonio Gramsci wrote in his prison notebooks: “I want, following a fixed plan, to devote myself intensely and systematically to some subject that will absorb me and give a focus to my inner life.”

Mission accomplished!

¹ VA. CODE ANN. § 19.2-298.01 (2021) (entitled “Use of discretionary sentencing guidelines.”)

² Virginia Criminal Sentencing Commission, Annual Report (2020), page 14, *available at* <http://www.vcsc.virginia.gov/2020VCSCAnnualReport.pdf> (“For cases recommended for incarceration of more than six months, the sentence length recommendation derived from the guidelines (known as the midpoint) is accompanied by a high-end and low-end recommendation.”).

³ *See, e.g.,* Virginia Criminal Sentencing Commission, Assault Worksheet, *available at* <http://www.vcsc.virginia.gov/worksheets2021/Assault.pdf> (taking into account prior convictions/adjudications).

⁴ In Virginia in fiscal year 2020, 7.6% of sentencing decisions resulted in upward departure (“aggravation”). Annual Report, *supra* note 2, at 14.

⁵ VA. CODE ANN. § 19.2-298.01 (2021).

⁶ *Id.*

Based on this subsection of 19.2-298.01 there is some culpability on trial counsel to at least make the case for a sentence within the prescribed guidelines. Unfortunately his or her efforts may be futile at best, especially when you consider the fact that these guidelines are “discretionary.”

The issue that is even more problematic is the fact that the body responsible for creating guidelines and how they function consists of at least 6 judges—talk about “conflict of interest.” The agency known as the Virginia Criminal Sentencing Commission is clearly underperforming. In the years 2012-2016, about 15% of upward departures from the guidelines were missing a reason for the departure.⁷ Regardless of the fact that there is no sanction for judges not following the mandates in subsection (F) of 19.2-298.01, their failure to do so is clearly a violation of due process under the 14th Amendment of the United States Constitution.⁸

The primary roadblock for defendants in the state of Virginia is the obstructive rule set by the General Assembly and the Virginia Criminal Sentencing Commission that prohibits the prisoner’s ability to challenge the legality of the sentence imposed. In subsection (F) of 19.2-298.01 it reads “the failure to follow any or all of the provisions of this section in the prescribed manner shall not be reviewable on appeal or the basis of any other post-conviction relief.”⁹

This leaves a defendant with no recourse for what is clearly a violation but comes with no sanction of the judge nor does it require a new sentencing hearing. Equally troubling is the stipulation that if you’re tried by a jury, the jury shall not be presented any information regarding sentencing guidelines.¹⁰ Now the question remains, why is the statute so arbitrary towards defendants? Why does it restrict challenges to judges’ decisions? I’ll tell you why.

The Virginia Criminal Sentencing Commission was created “within the Judicial branch as an agency of The Supreme Court of Virginia.”¹¹ The Commission consists of 17 members:¹²

- 1) Six judges or justices
- 2) One person not an active member of the judiciary
- 3) Two people chosen by the Chair of the House Courts of Justice Committee and the Speaker of the House
- 4) One person chosen by the Chair of the Senate Courts of Justice Committee and the Rules committee

⁷ Virginia Criminal Sentencing Commission, Judicial Departure Reasons (Sept. 12, 2016), *available at* [http://www.vcsc.virginia.gov/2016meetings/Judicial%20Departure%20Reasons%20\(Sep%202012%202016\)%20HANDOUT.pdf](http://www.vcsc.virginia.gov/2016meetings/Judicial%20Departure%20Reasons%20(Sep%202012%202016)%20HANDOUT.pdf). For 43 of the 1086 cases sentenced above the guidelines recommendation in 2020 (about 4%), the Commission could not ascertain a departure reason. Annual Report, *supra* note 2, at 15.

⁸ The editors found no cases on point. See *Burns v. United States*, 501 U.S. 129, 138 (1991) for a finding that, in the context of the federal sentencing guidelines, a serious question is raised under the Fifth Amendment Due Process Clause as to whether notice is required for upward departures. Note, however, that *Burns* was decided when the sentencing guidelines were mandatory, unlike the discretionary guidelines in Virginia. See *Irizarry v. United States*, 553 U.S. 708, 713 (2008).

⁹ VA. CODE ANN. § 19.2-298.01(F) (2021).

¹⁰ VA. CODE ANN. § 19.2-298.01(A) (2021).

¹¹ VA. CODE ANN. § 17.1-800 (2021).

¹² VA. CODE ANN. § 17.1-802 (2021).

- 5) Four members are appointed by the Governor; at least one should be a representative of crime victim organizations or victims of crime.
- 6) The state's *Attorney General*

As you can see, there is a great deal of conflicting interest that can be found in this commission. Just as they have victim advocacy groups represented, they should also have an equal representation of prisoner advocacy group members. Just as they have judges represented, they should have defense attorneys on the counsel—after all, the Attorney General is essentially a prosecutor, particularly when it comes to the incarcerated. The Attorney General's office represents the state in opposition to prisoners regarding post-conviction motions. In any event, the fight against mass incarceration in the state of Virginia continues, and it begins with sentencing reform by reevaluating the consequences of Va. Code 19.2-298.01.