

# RESOURCE INFORMATION HELP FOR THE DISADVANTAGED

*“Improving the effectiveness and fairness of  
Virginia’s justice system”—RIHD*



## THE NEED FOR SENTENCING REFORM AND ESTABLISHMENT OF REMEDIES TO CORRECT INJUSTICES OF THE PAST

Lillie Branch-Kennedy, Founder & Executive Director  
Resource Information Help for the Disadvantaged (RIHD)  
P.O. Box 55, Highland Springs, Virginia 23075  
Web site: [www.rihd.org](http://www.rihd.org)  
Office: 804-426-4426  
Email: [rihd23075@aol.com](mailto:rihd23075@aol.com)

**INTRODUCTION:** RIHD is a statewide, non-profit organization based in Richmond, Virginia, which advocates criminal justice reform and an end to mass incarceration.

In 2009 RIHD received a “call to help” from Virginia prisoners and families to end the trend of mass incarceration, through sentencing reforms. Five years later, through an all-volunteer effort by friends and allies, RIHD is hopeful to introduce during the 2016 general assembly session sentencing reform legislation and establishment of remedies to correct injustices of that past that remain uncorrected. We believe said reform(s) will help end the trend of mass incarceration in Virginia.

Under the banner of its annual ***Mobile Justice Tour (MJT)***, its members travel the state to bring public awareness regarding justice-related issues relating decarceration, sentencing injustices reform, and juvenile justice reforms via fair and commonsense legislation. Five years later, through an all-volunteer effort by friends and allies, plans to introduce the enclosed sentencing reform “position papers” during the 2016 general assembly session. RIHD, believe said reform(s) will help end the trend of mass incarceration in Virgnia.

*A Special acknowledgement and appreciation to Mr. Oludare Ogunde, Legislative Analyst and founder of Prisoner and Families for Equal Rights and Justice (PAFERJ) assistance that made this report and position papers possible.*

## I. The Injustice of Five Years of Unfair Jury Trials In Virginia Remains Uncorrected

In 1994 Virginia passed laws abolishing parole for all persons convicted of nonviolent and violent crimes committed on or after January 1, 1995, allowing only for geriatric release for certain class of offenders over the age of sixty or sixty-five. When these laws came into effect in 1995, the court rules at the time prohibited judges from instructing juries in non-capital cases that the defendant would not be entitled to parole if sentenced to a term of incarceration, even in cases where the jury requested to know whether the offender would be entitled to parole. Consequently, juries that sentenced offenders in the months and years following the abolition of parole were not instructed by judges that parole had been abolished; thus, they imposed sentences under the erroneous impression that only a fraction of the sentence would be served by the offender. It was not until June 2000, in the case of *Fishback v. Commonwealth*, 260 Va. 104, 532 S.E. 2d 629 (2000), that the Virginia Supreme Court ruled that judges must instruct jurors in all non-capital cases that parole has been abolished. In reaching its decision, the Supreme Court confirmed what had long been obvious to observers of Virginia criminal justice system: that instructing juries who will impose sentence that parole has been abolished would ensure a fair trial for both the offender and the Commonwealth. Sadly, however, the Supreme Court declined to make its *Fishback* ruling retroactive, meaning that those offenders whose convictions had become final before the ruling would not be entitled to a new sentencing by a jury that is properly instructed on the abolition of parole.

Two decades later, while many of those affected have completed their sentences, there are still some who remain behind bars without any remedy and who are serving sentences far beyond what the jury actually intended. The actual number of those affected who still remain behind bars is yet unknown<sup>1</sup>, but how many they are should not be a factor or a relevant inquiry because, even if only one man or woman is languishing in prison based on this injustice, we hold it true that “injustice to one is injustice to all.”

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<sup>1</sup> RIHD has received letters from many prisoners who were sentenced under the no-parole laws and prior to the *Fishback* ruling. So we know for a fact that any remedy will impact more than a handful of prisoners.

Indeed, what should matter to us all is whether it is just and moral to let these men and women continue to languish in our prisons, knowing that they were unfairly sentenced. If we reach the logical conclusion that it is unjust and immoral to do so, then the inquiry is: what is the fair and just remedy?

**RIHD's Proposed Remedy:** A legislation which provides in part that<sup>2</sup>:

- (1) The *Fishback* decision and the legal principles underlying its decision be made retroactive to all presently incarcerated persons convicted and sentenced by a jury prior to the *Fishback* decision;
- (2) All presently incarcerated persons convicted and sentenced by a jury on or after January 1, 1995, and prior to the *Fishback* decision, be afforded a new sentencing by a properly instructed jury and afforded the opportunity to negotiate a guilty plea to a reduced sentence.

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<sup>2</sup> See Appendix A for the full text of the proposed bill

## **II. Sentencing Disparity Resulting From Discretionary Use of the Sentencing Guidelines**

The abolition of parole in the 90s brought along the adoption of the sentencing guidelines that prescribe punishment far more severe than what was imposed prior to the abolition of parole (See Va. Code § 17.1-805<sup>3</sup>). While the law makes the use of the guidelines discretionary (See Va. Code § 19.2-298.01<sup>4</sup>), that very law makes it mandatory that courts “shall file with the record of the case a written explanation” of any departure from the guidelines recommendation. Problem is, the very same law provides that the failure to comply with its provision in any manner will not be reviewable on appeal or form the basis of any post-conviction relief. Thus, making the aforementioned mandatory provision meaningless and inutile.

The result is that sentences imposed by judges far in excess of the guidelines recommendations, and even on a basis that has no place in sentence consideration, are not reviewable on appeal. So it is the lamentable case in Virginia that a judge with racist inclination may act with impunity under our current laws and throw the book at a defendant merely for his skin color. What is the remedy in our justice system for such a defendant, you may ask? Well, the answer is, None whatsoever! Our current law bars appellate courts from reviewing a trial court’s sentencing decision vis-a-vis the guidelines.

According to the Virginia Criminal Sentencing Commission Annual Reports from FY 2007 to FY 2013, no written reason for departure was provided by judges in more than 3000 cases in which the sentence imposed exceeded the guidelines recommendation. Thus, it is unclear whether the departure in those cases was due to factors like race, religion, sexual orientation, economic status, or other considerations that should not play a role in sentencing decisions.

One thing, however, is clear to those of us who have observed and studied the use of the sentencing guidelines by judges in many Virginia courts: the current

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<sup>3</sup> See Appendix B for a full text of the statute

<sup>4</sup> See Appendix C for a full text of the statute.

law governing the use of the sentencing guidelines creates and promotes sentencing disparity and contributes to, what we call, **apartheid of justice**. Justice is not equal for a Black man or woman in many courts in Virginia, as evidenced by the overrepresentation of Blacks in Virginia prisons and by Blacks serving sentences far greater than what similarly situated whites are serving.

One of the examples that we present on the Tour is the case of Mr. Kevin Key, an African American, who is currently serving a 31- year sentence under the no-parole law for possession with the intent to distribute 5 lbs. of marijuana. This abominable sentence was imposed by the Chesapeake Circuit Court despite the fact that Mr. Key was a first-time offender and the fact that the sentencing guidelines presented to the court by the probation and parole recommended alternative punishment and no more than 2 years and 2 days of incarceration. His release date according to the information on DOC website is May 27, 2027. Indeed, not only is the 31-year sentence unfair to Mr. Key, it is equally unfair to the citizens of Virginia who have to pay out almost a million dollars in cost to confine and separate him from his family.

Much has been written and said in recent years by observers of the Virginia criminal justice system to condemn its unfair and discriminatory practices. For instance, a 2013 report by the Washington, D.C-based *Justice Policy Institute* concluded that people of color, particularly African Americans, are overrepresented at each stage of the Virginia criminal justice system. While African Americans in Virginia comprise roughly 20 percent of the adult population, in the justice system they comprise:

- 47.4 percent of all arrests
- 76.2 percent of robbery arrests
- 52.2 percent of aggravated assault arrests
- 60.8 percent of state prison inmates (For every white person incarcerated in Virginia, six African Americans are behind bars)

As a result of the figures above, 20.4 percent of African-American Virginians have lost the right to vote, isolating them from their communities and civic participation.

Source: Justice Policy Institute—*Virginia's Justice System: Expensive, Ineffective and Unfair* (November 2013)

### Apartheid of Justice: The Numbers Don't Lie



**RIHD's Proposed Remedy:** The use of the sentencing guidelines in Virginia is primarily governed by Virginia Code § 19.2-298.01. What we have proposed is to amend subsections B and F of the statute to read as follows<sup>5</sup>:

- B. In any felony case, other than Class 1 felonies, in which the court imposes a sentence which is either greater or less than that indicated by the discretionary sentencing guidelines, the court shall file with the record of the case a written explanation of such departure. *The written explanation must show a substantial and compelling reason for the departure and must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. Any factor or reason given to justify the departure must not be one that has already been considered in calculating the guidelines recommendation, including such factors and reasons for enhancement in the provisions of Code § 17.1-805.*
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<sup>5</sup> See Appendix D for the full text of the RIHD proposal

*F. 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 or the failure to impose sentence within the range recommended by the sentencing guidelines shall be reviewable on appeal. In reviewing the sentence, the appellate court must first ensure that the court made no significant procedural errors and then consider the sentence's substantive reasonableness under a deferential abuse-of-discretion standard, taking into account the totality of the circumstances. This provision shall be retroactive to all cases where the defendant is presently under the custody of the Virginia Department of Corrections pursuant to felony offense.*

## **CONCLUSION**

While other injustices will necessarily remain uncorrected due to our flawed criminal justice system (at least not until we establish a comprehensive reform of the system), correcting just these two will be a step in the right direction for Virginia. The state owes a moral duty to correct, at any cost, any and all known injustices that keep our fellow citizens languishing behind bars and separated from their families. The injustices of today that keep a disproportionately large number of Blacks separated from their families and caged behind bars is no different from the dastardly and diabolical lynchings of the past orchestrated by Whites with impunity. Furthermore, it is a moral imperative to eschew and uproot the appearance and perpetration of racial bias and disparity in the implementation of our sentencing guidelines. Notwithstanding the twenty-first century, apartheid of justice remains the system du jour in Virginia. The road to ending it is long, but a positive step on that road is amending the statute governing the use of the sentencing guidelines to prevent judges from imposing sentences on the basis of factors like race, sex, religion, etc., that should never be considered in imposing sentence. Thus, it is necessary to amend the law so that the discretionary use of the sentencing guidelines by judges is amenable to appellate review for abuse of discretion.

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Appendix A  
**RIHD'S POSITION PAPER**  
**Correcting the Injustice of Five Years**  
**of Unfair Jury Trials**  
**(HB\_\_\_\_and SB\_\_\_\_)**

**Suggested Language:**

Whereas in 1994 the General Assembly passed laws abolishing parole for all persons convicted of felonies committed on or after January 1, 1995, allowing only for geriatric release for certain class of offenders over the age of sixty or sixty-five;

Whereas at the time the law came into effect in 1995 the court rules at the time prohibited judges from instructing a jury in non-capital cases that the defendant would not be entitled to parole if sentenced to a term of incarceration, even in cases where the jury requested to know whether the defendant would be entitled to parole;

Whereas as a result juries that sentenced defendant in the months and years following abolition of parole were not instructed by judges that parole had been abolished. Consequently, juries across Virginia imposed lengthy sentences under the erroneous impression that only a fraction of the sentence would be served by the defendant;

Whereas in June 2000, in the case of *Fishback v. Commonwealth*, 260 Va. 104, 532 S.E.2d 629 (2000), the Virginia Supreme Court ruled that judges must instruct juries in all non-capital cases that parole has been abolished; and in reaching its decision, the Court stated that “[a] jury should not be required to perform [its] critical and difficult responsibility without the benefit of all significant and appropriate information that would avoid the necessity that it speculate or act upon misconceptions concerning the effect of its decision;”

Whereas the Court made its *Fishback* decision only prospective and not retroactive; thus denying relief to many defendants who were convicted and sentenced by a jury that was not instructed that parole had been abolished and who consequently did not receive a fair trial.

Therefore, be it resolved that:

- (1) The *Fishback* decision and the legal principles underlying its decision be made retroactive to all presently incarcerated persons convicted and sentenced by a jury prior to the *Fishback* decision;
- (2) All presently incarcerated persons convicted and sentenced by a jury on or after January 1, 1995, and prior to the *Fishback* decision, be afforded a new sentencing by a properly instructed jury and afforded the opportunity to negotiate a guilty plea to a reduced sentence.

**Purpose:**

The purpose of the proposed bill is to correct a grave injustice that remains uncorrected. Some of the men and women sentenced by juries prior to *Fishback* remain imprisoned due to the unusually long sentences imposed by the uninstructed jury. This bill will afford them the opportunity to be sentenced by a properly instructed jury or an opportunity to negotiate a reduced sentence.

**Budget Considerations:**

The proposed bill would decrease the amount of time served in prison by many inmates; therefore, it would result in savings to the Commonwealth.

**Appendix B**

**§ 17.1-805. Adoption of initial discretionary sentencing guideline midpoints.**

A. The Commission shall adopt an initial set of discretionary felony sentencing guidelines which shall become effective on January 1, 1995. The initial recommended sentencing range for each felony offense shall be determined first, by computing the actual time-served distribution for similarly situated

offenders, in terms of their conviction offense and prior criminal history, released from incarceration during the base period of calendar years 1988 through 1992, increased by 13.4 percent, and second, by eliminating from this range the upper and lower quartiles. The midpoint of each initial recommended sentencing range shall be the median time served for the middle two quartiles and subject to the following additional enhancements:

1. The midpoint of the initial recommended sentencing range for first degree murder, second degree murder, rape in violation of § [18.2-61](#), forcible sodomy, object sexual penetration, and aggravated sexual battery, shall be further increased by (i) 125 percent in cases in which the defendant has no previous conviction of a violent felony offense; (ii) 300 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum punishment of less than 40 years; or (iii) 500 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum punishment of 40 years or more, except that the recommended sentence for a defendant convicted of first degree murder who has previously been convicted of a violent felony offense punishable by a maximum term of imprisonment of 40 years or more shall be imprisonment for life;
2. The midpoint of the initial recommended sentencing range for voluntary manslaughter, robbery, aggravated malicious wounding, malicious wounding, and any burglary of a dwelling house or statutory burglary of a dwelling house or any burglary committed while armed with a deadly weapon or any statutory burglary committed while armed with a deadly weapon shall be further increased by (i) 100 percent in cases in which the defendant has no previous conviction of a violent felony offense, (ii) 300 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum term of imprisonment of less than 40 years, or (iii) 500 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum term of imprisonment of 40 years or more;
3. The midpoint of the initial recommended sentencing range for manufacturing, selling, giving or distributing, or possessing with the intent to manufacture, sell, give or distribute a Schedule I or II controlled substance shall

be increased by (i) 200 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum punishment of less than 40 years or (ii) 400 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum term of imprisonment of 40 years or more; and

4. The midpoint of the initial recommended sentencing range for felony offenses not specified in subdivision 1, 2, or 3 shall be increased by 100 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum punishment of less than 40 years, and by 300 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum term of imprisonment of 40 years or more.

B. For purposes of this chapter, previous convictions shall include prior adult convictions and juvenile convictions and adjudications of delinquency based on an offense which would have been at the time of conviction a felony if committed by an adult under the laws of any state, the District of Columbia, the United States or its territories.

C. For purposes of this chapter, violent felony offenses shall include any felony violation of § 16.1-253.2; solicitation to commit murder under § 18.2-29; any violation of § 18.2-31, 18.2-32, 18.2-32.1, 18.2-32.2, 18.2-33, or 18.2-35; any violation of subsection B of § 18.2-36.1; any violation of § 18.2-40 or 18.2-41; any violation of clause (c)(i) or (ii) of subsection B of § 18.2-46.3; any violation of § 18.2-46.5, 18.2-46.6, or 18.2-46.7; any Class 5 felony violation of § 18.2-47; any felony violation of § 18.2-48, 18.2-48.1, or 18.2-49; any violation of § 18.2-51, 18.2-51.1, 18.2-51.2, 18.2-51.3, 18.2-51.4, 18.2-51.6, 18.2-52, 18.2-52.1, 18.2-53, 18.2-53.1, 18.2-54.1, 18.2-54.2, or 18.2-55; any violation of subsection B of § 18.2-57; any felony violation of § 18.2-57.2; any violation of § 18.2-58 or 18.2-58.1; any felony violation of § 18.2-60.1, 18.2-60.3, or 18.2-60.4; any violation of § 18.2-61, 18.2-64.1, 18.2-67.1, 18.2-67.2, former § 18.2-67.2:1, 18.2-67.3, 18.2-67.5, or 18.2-67.5:1 involving a third conviction of either sexual battery in violation of § 18.2-67.4 or attempted sexual battery in violation of subsection C of § 18.2-67.5; any Class 4 felony violation of § 18.2-63; any violation of subsection A of § 18.2-67.4:1; any violation of subsection A of § 18.2-77; any Class 3 felony violation of § 18.2-79; any Class 3 felony violation of § 18.2-80; any violation of § 18.2-85, 18.2-89, 18.2-90, 18.2-91, 18.2-92, or 18.2-93; any

felony violation of § [18.2-152.7](#); any Class 4 felony violation of § [18.2-153](#); any Class 4 felony violation of § [18.2-154](#); any Class 4 felony violation of § [18.2-155](#); any felony violation of § [18.2-162](#); any violation of § [18.2-279](#) involving an occupied dwelling; any felony violation of subsection A or B of § [18.2-280](#); any violation of § [18.2-281](#); any felony violation of subsection A of § [18.2-282](#); any felony violation of § [18.2-282.1](#); any violation of § [18.2-286.1](#), [18.2-287.2](#), [18.2-289](#), or [18.2-290](#); any violation of subsection A of § [18.2-300](#); any felony violation of subsection C of § [18.2-308.1](#) or [18.2-308.2](#); any violation of § [18.2-308.2:1](#) or subsection M or N of § [18.2-308.2:2](#); any violation of § [18.2-308.3](#) or [18.2-312](#); any violation of subdivision (2) or (3) of § [18.2-355](#); any violation of former § [18.2-358](#); any violation of subsection B of § [18.2-361](#); any violation of subsection B of § [18.2-366](#); any violation of § [18.2-368](#), [18.2-370](#), or [18.2-370.1](#); any violation of subsection A of § [18.2-371.1](#); any felony violation of § [18.2-369](#) resulting in serious bodily injury or disease; any violation of § [18.2-374.1](#); any felony violation of § [18.2-374.1:1](#); any violation of § [18.2-374.3](#) or [18.2-374.4](#); any second or subsequent offense under §§ [18.2-379](#) and [18.2-381](#); any felony violation of § [18.2-405](#) or [18.2-406](#); any violation of § [18.2-408](#), [18.2-413](#), [18.2-414](#), [18.2-423](#), [18.2-423.01](#), [18.2-423.1](#), [18.2-423.2](#), or [18.2-433.2](#); any felony violation of § [18.2-460](#), [18.2-474.1](#), or [18.2-477.1](#); any violation of § [18.2-477](#), [18.2-478](#), [18.2-480](#), [18.2-481](#), or [18.2-485](#); any violation of § [37.2-917](#); any violation of § [52-48](#); any violation of § [53.1-203](#); or any conspiracy or attempt to commit any offense specified in this subsection, and any substantially similar offense under the laws of any state, the District of Columbia, the United States or its territories.

(1994, 2nd Sp. Sess., cc. [1](#), [2](#), § 17-237; 1995, c. [482](#); 1998, cc. [277](#), [872](#); 1999, c. [349](#); 2004, cc. [459](#), [866](#); 2005, c. [631](#); 2011, c. [282](#); 2013, cc. [424](#), [647](#).)

## Appendix C

### § 19.2-298.01. Use of discretionary sentencing guidelines.

A. In all felony cases, other than Class 1 felonies, the court shall (i) have presented to it the appropriate discretionary sentencing guidelines worksheets and (ii) review and consider the suitability of the applicable discretionary sentencing guidelines established pursuant to Chapter 8 (§ [17.1-800](#) et seq.) of Title 17.1. Before imposing sentence, the court shall state for the record that

such review and consideration have been accomplished and shall make the completed worksheets a part of the record of the case and open for inspection. In cases tried by a jury, the jury shall not be presented any information regarding sentencing guidelines.

*B. In any felony case, other than Class 1 felonies, in which the court imposes a sentence which is either greater or less than that indicated by the discretionary sentencing guidelines, the court shall file with the record of the case a written explanation of such departure.*

C. In felony cases, other than Class 1 felonies, tried by a jury and in felony cases tried by the court without a jury upon a plea of not guilty, the court shall direct a probation officer of such court to prepare the discretionary sentencing guidelines worksheets. In felony cases tried upon a plea of guilty, including cases which are the subject of a plea agreement, the court shall direct a probation officer of such court to prepare the discretionary sentencing guidelines worksheets, or, with the concurrence of the accused, the court and the attorney for the Commonwealth, the worksheets shall be prepared by the attorney for the Commonwealth.

D. Except as provided in subsection E, discretionary sentencing guidelines worksheets prepared pursuant to this section shall be subject to the same distribution as presentence investigation reports prepared pursuant to subsection A of § [19.2-299](#).

E. Following the entry of a final order of conviction and sentence in a felony case, the clerk of the circuit court in which the case was tried shall cause a copy of such order or orders, the original of the discretionary sentencing guidelines worksheets prepared in the case, and a copy of any departure explanation prepared pursuant to subsection B to be forwarded to the Virginia Criminal Sentencing Commission within five days. Similarly, the statement required by §§ [19.2-295](#) and [19.2-303](#) and regarding departure from or modification of a sentence fixed by a jury shall be forwarded to the Virginia Criminal Sentencing Commission.

*F. 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.*

G. The provisions of this section shall apply only to felony cases in which the offense is committed on or after January 1, 1995, and for which there are discretionary sentencing guidelines. For purposes of the discretionary sentencing guidelines only, a person sentenced to a boot camp incarceration program pursuant to § 19.2-316.1, a detention center incarceration program pursuant to § 19.2-316.2 or a diversion center incarceration program pursuant to § 19.2-316.3 shall be deemed to be sentenced to a term of incarceration.

(1994, 2nd Sp. Sess., cc. 1, 2; 1996, c. 552; 1997, c. 345; 1998, cc. 200, 353; 1999, c. 286; 2007, c. 259.) #

**Appendix D**  
**RIHD'S POSITION PAPER**  
**Use of Discretionary Sentencing Guidelines**  
**(HB\_\_\_\_and SB\_\_\_\_)**

**Suggested Language:**

Be it enacted by the General Assembly of Virginia:

That §§ 19.2-298.01(B) 19.2-298.01(F) are amended and reenacted as follows:

B. In any felony case, other than Class 1 felonies, in which the court imposes a sentence which is either greater or less than that indicated by the discretionary sentencing guidelines, the court shall file with the record of the case a written explanation of such departure. *The written explanation must show a substantial and compelling reason for the departure and must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. Any reason given to justify the departure must not be one that has already been considered in calculating the guidelines recommendation, including such factors and reasons for enhancement in the provisions of Code § 17.1-805.*

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F. *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 or the failure to impose sentence within the range recommended by the sentencing guidelines shall be reviewable on appeal. In reviewing the sentence, the appellate court must first ensure that the court made no significant procedural errors and then consider the sentence's substantive reasonableness under a deferential abuse-of-discretion standard, taking into account the totality of the circumstances. This provision shall be retroactive to all cases where the defendant is presently under the custody of the Virginia Department of Corrections.*

**Purpose:**

The purpose of the proposed amendment is to eliminate disparity and achieve consistency and fairness in sentencing by allowing appellate review of the decision of a judge to depart from the sentencing guidelines recommendations. The amendment will also prevent judges from justifying their departure on the basis of factors that have already been considered in calculating the guidelines. A common practice that is so inherently unfair and unjust. More importantly,

the amendment will provide a review remedy for presently incarcerated persons whose sentences exceed the guidelines recommendation.

Although the sentencing guidelines are discretionary and advisory in nature, § 19.2-298.01(B) requires the sentencing judge to provide a written reason for any departure from the guidelines recommendation. Yet, notwithstanding this mandate of the law, the Virginia Sentencing Commission Annual Reports from FY 2007 to FY 2013, for instance, show that no written reason for departure was provided by judges in more than 3000 cases in which the sentence imposed exceeded the guidelines recommendation. Thus, it is unclear whether the departure in those cases was due to factors like race, religion, sex, economic status, or other factors that should not play any role in sentencing decisions. This amendment will eliminate such problem and make Virginia's truth-in-sentencing transparent and will serve the very purpose for which it was initially enacted. Finally, the standard of appellate review in § 19.2-298.01(F) will establish the legal standard set forth by the United States Supreme Court for review of sentences imposed outside the federal sentencing guidelines in *Gall v. United States*, 552 U.S. 38 (2007).

#### **Budget Considerations:**

There is no cost ####

RIHD

PO Box 55 = Highland Springs, Virginia 23075

Telephone: (804) 426-4426

Email: [rihd23075@aol.com](mailto:rihd23075@aol.com) Web site: [www.rihd.org](http://www.rihd.org)

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