NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
Fairfax County Courthouse
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September 1, 2017

LETTER OPINION

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RE: *Commonwealth v. Jairo Deleon Villagran*
FE-2017-573

Dear Counsel:

This matter came on for hearing this 1st day of September, 2017, on the Defendant's Motion to Strike Language in the Presentence Investigation Report, to wit, the *recommendation* that the Defendant be sentenced to "a short period of active

incarceration" notwithstanding the fact the applicable Virginia Sentencing Guidelines recommend "probation." For the reasons as more fully stated herein below, the Court DENIES the Defendant's motion.

FACTS

The Defendant pled guilty to one count of Custodial Indecent Liberties in violation of §18 2-370.1 of the Code of Virginia The facts concerning the offense are of limited import to the determination of the motion inasmuch as the argument of Defendant presents a challenge to the generalized authority of probation officers to make sentencing recommendations.

From the defense perspective, the Defendant was painted as a hardworking individual whose work history dates back to the age of 10. He was described as subject to significant hardships and deprivations consequent to poverty and war strife in his native Guatemala, including, but not limited to, the murder of his father while the Defendant was an infant. In 2005, the Defendant who is now 38 years in age, moved to the United States and shared a residence with his girlfriend and their two children. A third child was previously born to the girlfriend which the Defendant raised as if she was his own.

From the Commonwealth's evidence, the Defendant admitted touching his step daughter's private parts on three to six occasions, either under or over clothes, typically while she slept. He admitted and took responsibility for his behavior. He could point to no reason why he would serve for so long as an exemplary step parent and then suddenly engage in such despicable behavior. Before the Defendant was detained and

prosecuted, the child feared going to sleep at night because of the possibility she would be touched inappropriately as a consequence thereof. The touching began when the child was 13 years in age. The Defendant has no prior criminal record.

The Virginia Sentencing Guidelines recommend the Defendant be sentenced to probation without incarceration. The undersigned judge has made a generalized request to Virginia Probation and Parole to include certain information in its probation reports, including but not limited to programmatic and other sentencing recommendations The request of Probation and Parole made by the Court is pursuant to §19.2-299 in general, and specifically because the Court is in the process of implementing "Evidence Based Sentencing Practices," a regimen designed to promote public safety through risk reduction and management of probation-eligible offenders. Planned implementation includes but is not limited to the integration into the sentencing decision of scientifically validated risk assessment tools, evaluation of eligibility for various programs, prioritization of supervision and treatment resources for higher risk offenders, targeting interventions to criminogenic needs, application of dosage probation, use of positive reinforcement, and exercise of numerous other techniques which have shown promise in reducing recidivism and enhancing the safety of the public, coupled with back-end measurement of the effectiveness of such efforts.

In response to the generalized request from the Court not specific to this cause, the probation officer assigned to the case, relying on his training and expertise, included as part of his recommendations the Defendant be sentenced to a short period of incarceration. The Defendant filed his motion to strike such recommendation alleging it

"is not a fact as contemplated under the Virginia Code Ann. §19.2-299" and that the inclusion of such averment is inappropriate.

ANALYSIS

The Defendant relies in his motion on two main arguments. First, he states the probation officer's recommendation is excluded by the following language from §19.2-299(A), wherein the

> court shall direct a probation officer of such court to thoroughly investigate and report...all other relevant facts to fully advise the court so the court may determine the appropriate sentence to be imposed

Second, he relies on the following language from the Supreme Court of Virginia: "It may not be amiss to say that the statute does not contemplate that the probation office recommend what sentence should be imposed." *Linton v. Commonwealth*, 192 Va. 437, 440 (1951) (predecessor statute to §19.2-299 codified as §53-278.1).

The Court begins its analysis by observing that §53-278.1 contained language which was very different from the current iteration of the statute authorizing presentence investigation reports. It called upon the probation officer to "report on any and all facts tending to show *extenuating circumstances*, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed." *Linton*, 192 Va. at 438 (emphasis added). Rather than reporting on "extenuating circumstances," the report in the *Linton* case recommended the defendant be sentenced to the maximum penalty of the offense as charged, namely ten years. It can hardly be said that the probation officer in that case was acting within the spirit of his mandate No copy of the report was given to the defendant and she was brought to court in the absence of her attorneys and

sentenced in accordance with the recommendation on the very day the report was filed. *Linton*, 192 Va. at 439. The report was "the chief if not all the evidence considered by the court" in arriving at its sentence. An inference that may be drawn from *Linton* is that the Supreme Court of Virginia frowned upon a supplantation of the Court's independent judgment with that of the probation officer. *Linton*, 192 Va. at 440-41. The defendant was neither able to read the report nor was it read to her so that she could avail herself of the option to cross-examine the authoring officer. In such a context, the Supreme Court of Virginia found the defendant was denied "fundamental rights accorded by the statute" and reversed her conviction *Linton*, 192 Va. at 441-42.

Section 19.2-299 is no longer limited to the gathering of "extenuating circumstances," which instead includes the language that the probation officer is to report "all other relevant facts to fully advise the court so the court may determine the appropriate sentence to be imposed." One can imply from such amending choice by the General Assembly that the restriction on sentencing recommendations suggested by Defendant, to the extent it ever existed in the past, is no longer applicable. Probation officers undergo lengthy professionalized training by the Virginia Department of Corrections in order to develop skills to assess among other factors, what sentencing alternatives best serve to protect public safety and reduce recidivism. There has been a long accepted practice in Virginia Circuit Courts of considering the recommendations of probation officers in the fashioning of an appropriate sentence. It is noteworthy that Virginia consistently ranks as having the lowest or near the lowest rate of recidivism of prisoners released from the penitentiary because of the application of evidence based practices focused on improving re-entry of those released back into society. The

recommendations of probation officers integrating scientifically validated risk assessment sentencing tools serve to aid the Court in fashioning a sentence that enhances justice and is not merely based on the judge's gut feeling of what may be appropriate.

Moreover, Virginia Probation and Parole is part of the Executive Branch of the government of Virginia, being a division of the Department of Corrections which reports to the Secretary of Public Safety and Homeland Security. The Commonwealth's Attorney is also part of the Executive Branch, though an independently elected constitutional officer. The Commonwealth's Attorney may make sentencing recommendations to the Court. It is unlikely the General Assembly intended with the enactment of §19.2-299, that probation officers be permitted to make sentencing recommendations routed through prosecutors by virtue of being part of the Executive Branch, while not being able to make those same representations directly to the Court, subject to cross-examination by the Defendant.

The Court finds that the language cited to it from *Linton* was merely dicta in application of a statute with language distinguishing it from §19 2-299, and that further, "all other relevant facts" by its plain meaning encompasses sentencing recommendations from probation officers comprising just another *fact* the Court may consider in its sentencing determination.

CONCLUSION

The Defendant's Motion to Strike Language in the Presentence Investigation Report, to wit, the recommendation that the Defendant be sentenced to "a short period

of active incarceration" notwithstanding the fact the applicable Virginia Sentencing Guidelines recommend "probation," is DENIED.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER