Commonwealth of Virginia

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COMMONWEALTH'S ATTORNEY PROCEDURE MEMORANDUM	
	Date: 12/15/2020
Policy Title: Guidelines for Plea Bargaining, Charging Decisions, and Sentencing	
Summary: This policy makes comprehensive changes to the way the Commonwealth's Attorney's Office negotiates pleas, makes charging decisions, and advocates for sentences to bring such practices in line with the values and needs of the community and reduce mass incarceration.	
Authorizing Signature: 	

INTRODUCTION, VALUES & MISSION

Thousands of community members have discussed their views on criminal justice with the Commonwealth's Attorney and the Commonwealth's Attorney's Office continues to meet with community members to hear their voices and concerns through the Justice Advisory Council, community events, and other avenues. The community's values are the values of this office. The mission of this office is to take these values, along with the needs of the community, and assimilate them into our criminal justice system. These values and needs must inform and guide the work this office performs.

The guidelines established herein will ensure that each Assistant Commonwealth's Attorney (ACA) actively negotiates, advocates for, and otherwise pursues outcomes that reflect these values, and that ACAs avoid practices that are in conflict with these values.

PLEA BARGAINING, CHARGING DECISIONS & SENTENCING

1. ACAs Shall Advocate for a Position in Every Case. It is the responsibility of each ACA to use the authority of their position to affirmatively advocate for outcomes that reflect the values of the community. When ACAs defer to the court, they surrender the authority the community has vested in the Commonwealth's Attorney to speak on their behalf. To be clear, this office should not abdicate its responsibility to affect an outcome or squander an opportunity to speak on behalf of the community it represents. Every time an ACA is given the opportunity to speak or take a position, the ACA shall do so. In no situation should an ACA simply defer to the court's discretion without taking a position as to the outcome of a case.

2. Permissible Sentencing Agreements. The goal of plea negotiations is to reach outcomes that accord with the community's needs and values. The Fairfax County Commonwealth's Attorney's Office's prior method of plea bargaining is an impediment to achieving these goals. Historically, it was the practice of this office to negotiate with respect to the number and/or nature of charges, but to refrain from making sentencing agreements. The new policy set forth below aims to give ACAs the tools to reach the appropriate outcomes. In addition to negotiating with respect to the number and/or nature of charges, the following sentencing agreements are permitted, provided they are consistent with the standards and requirements as set forth in other sections of this policy:[1]
   (a) Agreed upon sentences for a specific amount of active or entirely suspended jail time, which should also, if possible, specify the period for which the time is suspended, the length of active probation (if any), and any special terms or conditions of probation (if any);
   (b) Agreed upon sentencing ranges;
   (c) Agreed upon sentencing caps;
   (d) Agreement only as to the number and nature of charges to which defendants plead guilty; and
   (e) Agreement to accomplish a deferred disposition.

   It is important that ACAs not use the tools granted via this policy to extract maximum punishment as opposed to reaching the correct and just outcome. In making plea agreements, ACAs must conduct a 360 degree analysis of each case and strive to reach the result that meets the needs of the community according to the community's values. ACAs must do this case-by-case analysis and avoid the standardization of plea offers over time that creates de facto mandatory minimums. Much as statutory mandatory minimums interfere with the process of fashioning appropriate outcomes based on the specific facts and circumstances of each case, these self-imposed de facto mandatory minimums have the same negative effect.

   A. Sentencing Agreement Considerations.

   It is important, in addition to all other considerations, to comply with the statutory obligations in Code Section 19.2-11.01 *et seq*. regarding victim's rights. The sentencing judge may inquire as to the Commonwealth's compliance with such obligations in deciding whether to accept or reject the agreed upon plea deal.

   In all situations, ACAs shall advocate for an agreement made by the Commonwealth, even if the agreement was made by another ACA. In no situation shall an ACA use any language to distance themselves from an agreement made by another ACA or in any way signal to the court their personal

[1] Where an agreement is permitted under this policy, ACAs should make an agreement as opposed to a recommendation.

disagreement with a plea deal. This office operates as one unit and each ACA will support and advocate for the decisions of their peers.[2]

3. Prosecutors Must Strike All Floor Adjustment Mandatory Minimums in Plea Agreements and Endeavor to Negotiate Around Remaining Mandatory Minimums.

A. Mandatory Minimum Definitions.

A properly functioning criminal justice system allows actors to fashion appropriate outcomes in each case based on the specific facts and circumstances of the individual case. Legislatively mandated minimum jail sentences interfere with this process. The Virginia Code contains hundreds of mandatory minimums, each of which fall into one of three categories. The steps reasonably available to limit the negative effects of mandatory minimums depend on the category of mandatory minimum at issue. The three types of mandatory minimums are as follows:

(a) *Floor Adjustment Mandatory Minimum*: an offense that: (1) is an enhancement to another offense based on the presence of an additional factor; (2) the presence of the additional factor creates a mandatory minimum floor of punishment; and (3) the presence of the additional factor does not affect the upper range of permissible punishment.[3]

(b) *Altered Sentencing Range Mandatory Minimum*: an offense that: (1) contains an enhancement to another offense based on the presence of an additional factor; (2) the presence of the additional factor creates a mandatory minimum floor of punishment; and (3) the presence of the additional factor increases the upper range of permissible punishment.

(c) *Mandatory Minimum Principal Offense*: an offense that contains a mandatory minimum floor of punishment that is not the result of an enhancement to another offense based on the presence of an additional factor.

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[2] For this reason, it is critically important that an ACA handling a plea or sentencing have a full and complete picture of why a particular sentencing agreement was made. Accordingly, for each felony case where the ACA makes a plea agreement, it shall be the responsibility of the ACA to do the following prior the date of the plea: (i) memorialize in the "Case Notes" section of ePros an explanation of why the plea agreement was made (incorporating all aspects considered in the 360 degree view of the case); (ii) place a copy of the printed note in the physical file, and (iii) prepare and upload the Guidelines to the "File Cabinet" in ePros, in PDF format, labeled as "Commonwealth's Guidelines," and place a copy of the printed Guidelines in the physical file.

[3] For example, under Section 3.2-4212, it is unlawful for a merchant to sell cigarettes that are not listed in the directory of cigarettes approved by the Commonwealth for sale. A violation of this law is punishable by a range of punishment from 0 to 12 months. However, if the violation involves 3,000 or more packages of cigarettes, the sentence shall include a mandatory minimum term of confinement of 90 days. The law thereby creates a floor of active incarceration but does not change the upper limit of the sentencing range available.

B. ACAs Must Strike All Floor Adjustment Mandatory Minimums in Plea Agreements.

With respect to all Floor Adjustment Mandatory Minimums, ACAs must make plea offers that avoid the legislatively mandated minimum jail sentence.[4] This can be done either by: (i) striking from the charging document reference to the additional factor that creates the mandatory minimum floor of punishment, (ii) amending the charge to a different code section, or (iii) where multiple charges exist or can be charged, offering a plea to the charge or charges that do not carry a mandatory minimum sentence - whichever the ACA deems appropriate in their discretion.

In such situations, ACAs are not prohibited from negotiating or advocating for active incarceration if such an outcome is in accord with the community's values and needs. However, an ACAs objective must not be to extract the maximum amount of incarceration as opposed to reaching the correct and just outcome. Moreover, in determining what outcome is just, the ACA's thought process should not be anchored by amount of time that would have been required by the mandatory minimum. The primary consideration in negotiating case resolutions must be the community's values and needs.

The community is best served by having the negotiation and sentencing process based around charges that do not contain mandatory minimum floors but offer the same upper range of punishment as the originally charged mandatory minimum offense. By removing the Floor Adjustment Mandatory Minimum, the system actors are free to shape an appropriate outcome based on the specific facts and circumstances of the individual case.

C. ACAs Must Endeavor to Negotiate Around Altered Sentencing Range Mandatory Minimums Where Appropriate.

With Altered Sentencing Range Mandatory Minimums, the mandatory minimum floor of punishment cannot be avoided without also foregoing the expanded sentencing range. Mandating that ACAs negotiate around this type of mandatory minimum in *all* cases is problematic because in *some* cases the lesser available sentencing range would not be sufficient for proper rehabilitation and supervision. ACAs shall consider whether the non-mandatory minimum version of such an offense, or an entirely different offense, is appropriate under the circumstances, but ACAs are not required to offer such a plea if the increased sentencing range is necessary. In making such a determination, ACAs should focus their analysis on the portion of the increased sentencing range that exceeds the sentencing range for the non-mandatory minimum version of the offense. If active or suspended time (or license suspension) in this portion of the range cannot be justified by the ACA on a case specific factual basis, the ACA shall offer a plea to the version of the offense without the mandatory minimum.

[4] DUI and DWI offenses shall continue to be handled as provided for in Policy 20.006.

D. ACAs Must Endeavor to Negotiate Around Mandatory Minimum Principal Offenses Where Appropriate.

Given that Mandatory Minimum Principal Offenses contain a minimum floor of punishment that is encompassed within the principal offense, rather than as an enhancement, avoiding the imposition of the mandatory minimum requires the charging of an entirely different offense. In such situations, ACAs are strongly encouraged, but not required in every instance, to offer a plea to an alternative, non-mandatory minimum offense or, where multiple charges exist or can be charged, the ACA should consider offering a plea to the charge or charges that do not carry a mandatory minimum sentence.

4. Excessive Active Probation is Prohibited. The length of active probation should always be specifically tailored to the actual needs of the case. In each case, active probation length should be devised to serve a specific rehabilitative goal, community safety need, or other purpose. The length agreed to, or advocated for, should never be a "standard" or reflexive length. Further, the sole purpose of active probation must never be to construct a framework for someone to serve an extended jail sentence in increments that was not otherwise justified at the time of sentencing.

   Excessive active probationary periods are often unnecessary. Most probation violations occur within the first year, suggesting that supervision beyond that point serves little or no rehabilitative purpose.[5] Accordingly, absent an articulable, fact specific basis, ACAs should endeavor to keep active probationary periods to 12 months or less. This is a general policy position, not an absolute. Cases involving violence, sexual abuse, sexual assault, a lengthy restitution period, or extensive substance abuse rehabilitative needs are examples where a longer active probationary period may be justified.

5. Deferred Dispositions Shall be Considered in Appropriate Cases. Prior to January 1, 2020, office policy was that ACAs would not agree to deferred dispositions in circuit court, or any other court, unless there was specific statutory authority for the deferred disposition (for example, 18.2-251, 18.2-57.3, etc.). This policy ended on January 1, 2020. The Virginia Supreme Court[6] and the Virginia Attorney General[7] have both opined that when the Commonwealth's Attorney and defendant concur, a trial court has the inherent authority to defer disposition in a criminal case and consider dismissal when the defendant has complied with the established conditions. Additionally, during the 2020 Special Session, the Virginia Legislature passed, and the governor signed into a law, a

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[5] States that have shortened supervision periods have seen no resulting increase in crime or recidivism See e.g., The Pew Charitable Trusts, "Missouri Policy Shortens Probation and Parole Terms, Protects Public Safety," August 2016, http://www.pewtrusts.org/-/media/assets/2016/08/missouri_policy_shortens_probation_and_parole_terms_protects_public_safety.pdf.

[6] Starrs v. Commonwealth, 287 Va. 1 (2014); Hernandez v. Commonwealth, 281 Va. 222 (2011).

[7] Va. Atty. Gen. Opinion No. 17-022, 2018 WL 6929179.

general deferred disposition statute that applies to all crimes and will take effect in March 2021.[8] This new code section, 19.2-298.02, not only allows agreements to dismiss a case, but also allows agreements to reduce a charge from a felony to a misdemeanor once all conditions are met. Accordingly, ACAs shall consider deferred dispositions in any appropriate case, including felony cases in circuit court, where the goals of justice and rehabilitation can be accomplished, and the values and needs of the community can be served, without imposing the life-long consequences of a misdemeanor or felony conviction.[9] In such cases, the ACA will accomplish the deferred disposition through an agreement rather than a recommendation.

An important part of Section 19.2-298.02 is the statutory ability of a defendant to expunge all or part of the matter after dismissal or reduction. Accordingly, no ACA shall propose or make any agreement where the ACA limits or prohibits a defendant's statutory right of expungement. Such an agreement would be contrary to the legislative intent behind the statute and the values and needs of the community.

6. ACAs Shall Dispose of Felony Charges as Misdemeanors Where Appropriate. In evaluating the nature of charge(s) to proceed with, whether for trial or a plea, if the disposition the ACA intends to advocate for can be accomplished with a misdemeanor conviction, and a misdemeanor appropriately reflects the alleged conduct, the ACA should consider proceeding with a misdemeanor charge. In other words, if the ACA does not intend to advocate for more than 12 months in jail (6 months to serve), and a misdemeanor is sufficient to achieve all other objectives, then the ACA should proceed with a misdemeanor.[10]

7. Mandatory Use of Alternative Sentencing. The Virginia Sentencing Commission utilizes the Nonviolent Risk Assessment Tool to enable the diversion of nonviolent defendants into alternative outcomes.[11] This tool, which is distinct from the Guidelines, but is calculated at the same time, is evidence-based and has proven to be effective in mitigating recidivism risk. This empirically-based

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[8] See Va. Code Section 19.2-298.02.

[9] If an ACA would like to make such an agreement on a felony or a misdemeanor case that involves an identifiable victim of a violent offense (as defined footnote 11 of the Bond Policy dated December 7, 2020, Policy No. 20.013), the ACA must first discuss the matter with their supervising Senior Assistant Commonwealth's Attorney (SACA) and obtain the approval of the SACA. Once verbal approval is granted, and all statutory victim's rights (as noted in Section 2.D. above) have been compiled with, the ACA should memorialize the approval and compliance in an email to the SACA. The ACA should then upload the email, in PDF format, with the file name "Authorization for Deferred Disposition" to the "File Cabinet" in ePros.

[10] The sole rationale for proceeding with a felony should not be that the person "needs felony level probation." The head of District 29 Probation and Parole informed this office that there is no material difference in the intensity in supervision of, or services available to, those on probation for felony theft, drug, or other nonviolent offenses versus those on probation for similar misdemeanor offenses.

[11] In 1994, the General Assembly required the Virginia Criminal Sentencing Commission to develop an empirically-based risk-assessment instrument for use in diverting "lowest-risk, incarceration-bound, drug and property offenders" to non-prison sanctions.

risk assessment takes into consideration over 200 unique factors. Accordingly, the Guidelines calculation may recommend a period of active incarceration, but the defendant may simultaneously qualify for alternative punishment/sentencing under the Nonviolent Risk Assessment Tool. Alternative sentencing may be as straightforward as an entirely suspended jail sentence, but can include other things such as the Intensive Supervision Program, home electronic and telephone monitoring, day reporting, diversion, community service, and substance abuse treatment.[12]

If the Nonviolent Risk Assessment Tool indicates that a defendant is "Recommended for Alternative Punishment," the ACA shall advocate for an alternative punishment that does not involve incarceration (including incarceration in the Adult Detention Center) and may not make a plea agreement that requires a defendant to waive such alternative punishment. In the very rare instance where the ACA believes the facts of the case do not merit an alternative punishment, they must: (i) discuss the case and proposed sentencing request with their supervising SACA prior to the sentencing hearing or making the plea agreement, (ii) receive authority from the SACA to proceed as proposed (which will be granted only in the most compelling of circumstances) , (iii) memorialize the authority in an email to their supervising SACA, and (iv) upload the email, in PDF format, with the file name "Authorization to Depart from Alternative Sentencing" to the "File Cabinet" in ePros prior to taking any action.

8. No Reflexive Reliance on the Virginia Sentencing Guidelines. In general, ACAs should not reflexively assume the Guidelines recommended sentence is appropriate. The Guidelines are based upon data from across the Commonwealth. In 2019, only 4.1% of this data came from Fairfax County cases.[13] Accordingly, the Guidelines recommendation is not necessarily representative of the values and needs of the Fairfax County community. Therefore, ACAs are directed to consider whether a downward departure from the Guidelines' recommended sentence is appropriate and consistent with the values and needs of the Fairfax County community.

9. Charging Solely to Increase the Guidelines is Prohibited. The act of indicting or authorizing the charging of numerous counts solely to artificially increase the active time recommended by the Guidelines is prohibited. When the sentencing range on one offense covers the maximum sentence an ACA would ask the court to impose, the ACA should avoid indicting or authorizing additional counts solely to increase sentencing guidelines. However, an ACA may indict or authorize additional counts as needed to accurately reflect the number of victims, accuracy

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[12] See Offender Risk Assessment in Virginia, p. 20-22, available at http://www.vcsc.virginia.gov/risk_off_rpt.pdf.

[13] 2019 Virginia Sentencing Commission Annual Report, p. 12, figure 1, available at http://www.vcsc.virginia.gov/2019VCSCAnnualReport.pdf.

of the charges, or for other reasons.

10. Death Penalty is Prohibited. In no case will this office seek the death penalty.

11. Review of Requests for a Life Sentence and Decisions to Proceed with Charges Carrying a Mandatory Life Sentence. ACAs may not: (i) advocate for a life sentence at a sentencing hearing, (ii) certify at preliminary hearing an offense carrying a mandatory life sentence, or (iii) indict, or amend a charge to, an offense carrying a mandatory life sentence without first: (a) drafting a written memorandum fully and fairly describing the details of the case and why a life sentence is both appropriate and consistent with the values of the community, (b) providing the memorandum to the Deputy of Court Strategies (DCS), with a copy to the ACA's supervising SACA, (c) receiving the written approval of the DCS to proceed as requested, and (d) uploading both the written approval and memorandum, in PDF format, with the file name "Authorization for Life Sentence" to the "File Cabinet" in ePros prior to taking the proposed action.

12. Unfairly Coercive and Retaliatory Tactics are Prohibited. ACAs should never threaten an adverse consequence solely because a defendant elects to have a preliminary hearing, argue a motion, or exercise a statutory or constitutional right. It may be the case that an ACA's offer does not change or becomes more or less favorable after seeing the presentation of evidence at a preliminary hearing or motion, or that an ACA amends a charge or indicts additional charges to accurately reflect the facts of a case that is proceeding to trial, but an ACA should not threaten to bring additional charges, enhance charges, or nolle pros and direct indict a case[14] solely to unfairly coerce or punish a defendant for a decision to exercise a constitutional or statutory right.

13. Prosecutors Will No Longer Act to Unilaterally Transfer Juveniles to Circuit Court for Treatment as Adults.

    A. Background

    Virginia Code Section 16.1-269 permits the transfer of a juvenile from juvenile court to circuit court for more severe treatment as an adult. As a general rule, a justice system should treat children as children. The transfer of a juvenile to circuit court should be exceedingly rare and done only under extreme circumstances. The unbridled and unilateral transfer of juvenile defendants by prosecutors from juvenile court to circuit court for handling as adults is in contravention of the values of the community and is prohibited.

    In limited situations, as specified in Subsection B of 16.1-269, the Code

[14] All direct indictments, including those that will accompany a charge or charges certified at preliminary hearing, must be approved, in advance of the grand jury, by the DCS.

mandates transfer of a juvenile to circuit court.[15] However, in the vast majority of other cases a prosecutor is permitted to make this decision as an exercise of discretion. When a prosecutor exercises this discretion, the prosecutor can elect to proceed under Subsection A or Subsection C of Section 16.1-269. If a prosecutor proceeds under Subsection A, a juvenile court judge is involved in the decision-making process and ultimately determines whether it is proper for the juvenile to be transferred to circuit court. If the prosecutor elects to proceed under Subsection C, the prosecutor bypasses the judge and unilaterally causes the case to be transferred to circuit court. Historically, a prosecutor's office would seek to transfer a juvenile to circuit court for treatment as an adult unilaterally under Subsection C avoiding the transfer hearing and divesting the juvenile court judge of a role in the decision-making process.

B. Prosecutors Shall Not Unilaterally Proceed with the Automatic Transfer of a Juvenile to Circuit Court for Treatment as an Adult.

In all scenarios where the Virginia Code does not mandate transfer, an individual ACA shall not unilaterally determine that a juvenile is a not proper person to remain within the jurisdiction of the juvenile court. Doing so deprives all involved of the benefit of the study and report called for under Section 16.2-269.2, prepared by probation services in anticipation of a transfer hearing under Section 16.1-269.1(A). Accordingly, ACAs shall not proceed with automatic transfer pursuant to Section 16.2-269.1(C), thereby bypassing the hearing provided for by Section 16.1-269.1(A) under any circumstances.

The community is served by the juvenile court holding a transfer hearing wherein probation services, defense counsel, and the Commonwealth examine the background and history of a juvenile offender, and the availability and appropriateness of services, so as to allow for a proper determination as to whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation. These decisions have lasting consequences and must not be taken without complete information and full and fair consideration.

In the rare case where an ACA determines it is appropriate to act under Section 16.2-269.1, the ACA must first obtain written approval and then proceed only under Subsection A. Before proceeding the ACA must: (i) draft a written memorandum fully and fairly describing the details of the case and addressing each of the factors in Section 16.1-269.1(A)(4)(a)-(j)[16], (ii) provide the

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[15] A court is mandated by the Virginia Code to transfer a juvenile defendant to circuit court under Section 16.1-269.1(B) when: (1) the juvenile is 16 years of age or older and (2) is charged with murder under Sections 18.2-31, 18.2-32, or 18.2-40, or aggravated malicious wounding under Section 18.2-51.2.

[16] Section 16.2-269.1(A)(4):

a. The juvenile's age;

b. The seriousness and number of alleged offenses, including (i) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (ii) whether the alleged

memorandum to the DCS, with a copy to the ACA's supervising SACA, (iii) receive the written approval of the DCS to proceed as proposed, and (iv) upload both the written approval and memorandum, in PDF format, with the file name "JDR Certification Authorization" to the "File Cabinet" in ePros.

14. Consideration of Immigration Consequences. ACAs shall consider immigration consequences where possible and where doing so accords with justice. Although not outcome determinative, prosecutors shall consider: (i) the collateral immigration consequences of the specific crime(s) the defendant is charged with, and (ii) the detrimental impact that deportation/removal has on the families and communities those removed or deported leave behind.[17] However, in some case, there will be significant limits as to what an ACA can do to avoid collateral immigration consequences. The weight accorded to potential adverse immigration consequences must be considered on a sliding scale. At one end of the scale, where the seriousness of the offense is significant and the harm to the victim is great, the weight accorded to potential adverse immigration consequences will be minimal. In a case where there is an act of violence and/or great harm done to a victim, the community's public safety interest in mitigating any future harm will likely outweigh other factors in the analysis. Conversely, where the offense is less serious and there is no identifiable victim, the ACA will

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offense was against persons or property, with greater weight being given to offenses against persons, especially if death or bodily injury resulted; (iii) whether the maximum punishment for such an offense is greater than 20 years confinement if committed by an adult; (iv) whether the alleged offense involved the use of a firearm or other dangerous weapon by brandishing, threatening, displaying or otherwise employing such weapon; and (v) the nature of the juvenile's participation in the alleged offense;

c. Whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation;

d. The appropriateness and availability of the services and dispositional alternatives in both the criminal justice and juvenile justice systems for dealing with the juvenile's problems;

e. The record and previous history of the juvenile in this or other jurisdictions, including (i) the number and nature of previous contacts with juvenile or circuit courts, (ii) the number and nature of prior periods of probation, (iii) the number and nature of prior commitments to juvenile correctional centers, (iv) the number and nature of previous residential and community-based treatments, (v) whether previous adjudications and commitments were for delinquent acts that involved the infliction of serious bodily injury, and (vi) whether the alleged offense is part of a repetitive pattern of similar adjudicated offenses;

f. Whether the juvenile has previously absconded from the legal custody of a juvenile correctional entity in this or any other jurisdiction;

g. The extent, if any, of the juvenile's degree of intellectual disability or mental illness;

h. The juvenile's school record and education;

i. The juvenile's mental and emotional maturity; and

j. The juvenile's physical condition and physical maturity.

[17]See e.g., The Effects of Deportation on Families and Communities, American Journal of Community Psychology, Volume 62:3, Issue 12, July 31, 2018, available at https://onlinelibrary.wiley.com/doi/epdf/10.1002/ajcp.12256.

have greater latitude in negotiating a resolution that takes adverse immigration consequences into account. The resolution will be different in a way that avoids or lessens the collateral immigration consequences, but will not be better than a resolution offered to a defendant that does not face such collateral issues.

As a predicate to any discussion or consideration of potential immigration consequences by an ACA, counsel for a defendant must first provide to the ACA a written and signed analysis on law firm letterhead: (i) identifying the potential adverse immigration consequence, (ii) setting forth a substantive analysis of the legal basis for the potential adverse immigration consequence (including appropriate citations to supporting statutes and case law), and (iii) identifying a suggested course of conduct that avoids the identified potential adverse immigration consequence with an accompanying substantive legal analysis.

15. Full Consideration of Mitigation Evidence and the Case. Any mitigation evidence presented should be given meaningful and thoughtful consideration. Mitigation evidence should be weighed against other case factors. Consideration should be given to the entirety of the case and the defendant, which will include, among other things, the nature of the offense, the prior conduct of the accused, the prior record of the accused, and the background of the accused, including any factors that may be root causes of the alleged criminal behavior such as underlying mental health or substance abuse issues. ACAs must take a thoughtful and holistic approach to the case and the underlying issues. In every case an ACA must be able to articulate how their decision reflects the values and needs of the community.

16. Proper Consideration of Prior Criminal Records. With respect to prior criminal records, it is critical to look at the entirety of someone's history. For example, an offense committed many years ago as a teenager does not weigh as heavily in the analysis as an offense committed more recently, or one committed shortly after being released from incarceration. Moreover, if an old offense, with no intervening criminal conduct, results in an unnecessary and substantial elevation of the Guidelines sentence, it is appropriate for the ACA to account for this in making a sentencing agreement or argument to the court.

17. Drug Possession. The focus of any case where the charge is simple drug possession, whether felony or misdemeanor, should be treatment. ACAs should encourage the treatment, not criminalization of addiction. This office rejects the argument that a person's recovery effort is helped by being made a convicted felon. The lifelong consequences of a felony conviction make overcoming addiction more difficult, not less.

18. Mental Health – ACAs should make use of the Mental Health Docket in all appropriate cases to encourage the treatment, not criminalization, of mental health issues. If an ACA believes a case is appropriate for the Mental Health Docket, the ACA should discuss the matter with their supervising SACA. If the

SACA agrees the case is appropriate for the docket, and the person qualifies for the Mental Health Docket, the approval should be memorialized in an email from the ACA to the SACA, with a copy to the ACA responsible for overseeing the Mental Health Docket. The ACA should then upload the email, in PDF format, with the file name "MH Docket Authorization" to the "File Cabinet" in ePros.

19. Veteran's Treatment Docket - ACAs should make use of the Veteran's Treatment Docket specialized treatment program in all appropriate cases, including appropriate felony cases, to divert veterans from the traditional criminal justice system and assist veterans suffering with addiction and/or mental health issues. If an ACA believes a case is appropriate for the Veteran's Treatment Docket, the ACA should discuss the matter with their supervising SACA. If the SACA agrees the case is appropriate for the docket, and the person qualifies for the Veteran's Treatment Docket, the approval should be memorialized in an email from the ACA to the SACA, with a copy to the ACA responsible for overseeing the Veteran's Treatment Docket. The ACA should then upload the email, in PDF format, with the file name "VT Docket Authorization" to the "File Cabinet" in ePros.

20. Creation of Standard Offers are Prohibited. This office does not have "standard offers" nor are ACAs permitted to develop their own "standard offer" for any type of case. Each offer should be specifically tailored to the facts and circumstances of the case.

21. No Individual Policies. ACAs cannot fulfill their mission to advocate for the values of the community when they develop their own individual or personal policies. Accordingly, this practice is prohibited with respect to any matter in this office, including those beyond the scope of the matters discussed herein. The only policies ACAs may implement, or be guided by, in any respect are the official polices established and adopted by this office.

NO GRANT OF ADDITIONAL RIGHTS

This policy, like all policies of the Fairfax County Commonwealth's Attorney's Office, provides only internal guidance, which may be modified, rescinded, or superseded any time without notice. This policy is not intended to, and may not, be relied upon to create any rights, expectations, privileges, or benefit to any individual enforceable at law in any administrative, civil, or criminal matter. This policy is not inviolable and may be deviated from as is deemed necessary by the Fairfax County Commonwealth's Attorney.