



# **COMMONWEALTH of VIRGINIA**

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February 25, 2009

The Honorable G. Carter Greer  
Judge, Twenty-First Judicial Circuit  
City of Martinsville Circuit Court  
P.O. Box 1347  
Martinsville, Virginia 24114

Dear Judge Greer:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## **Issue Presented**

You ask under what circumstances a criminal defendant may receive an active sentence to a state correctional facility and a sentence to the Detention Center Incarceration Program or the Diversion Center Incarceration Program.

## **Response**

It is my opinion that the General Assembly intended that a court should not sentence the same defendant to active incarceration with the Department of Corrections and to the Detention Center Incarceration Program or the Diversion Center Incarceration Program. It further is my opinion that in a situation where one court imposes a Detention or Diversion Center sentence that would be countermanded by another court's sentence for incarceration with the Department, the Department must give effect to the sentences imposed by both courts. This is so notwithstanding the general legislative intent that a Detention or Diversion Center sentence is an alternative to an active sentence and should not be imposed as a "bridge" between a prison sentence and release into the community.

## **Background**

You describe a situation where the criminal defendant has received an active sentence for incarceration with the Department of Corrections (the "Department") for a period of one year for a probation violation and a sentence to the Detention Center Incarceration Program for a new criminal conviction. You state that the same court imposed both sentences after conducting sentencing hearings for both events on the same day. You relate that a Department representative has advised the court that it interprets the applicable *Code* sections to preclude sentencing of the same defendant to active terms of incarceration with both the Department and the Detention Center. Therefore, you seek guidance on this matter.

### Applicable Law and Discussion

The General Assembly has afforded the judiciary a variety of sentencing options to impose punishment for a criminal conviction without imposing an active prison sentence. Two such alternatives are the Detention Center Incarceration Program<sup>1</sup> (the “Detention Center”) and the Diversion Center Incarceration Program<sup>2</sup> (the “Diversion Center”) (collectively, the “Programs”). The Programs are intended for defendants “who otherwise would have been sentenced to incarceration for a nonviolent felony.”<sup>3</sup> However, prior to 2005, there was no prohibition against a court combining an active sentence with a sentence to the Programs.<sup>4</sup> Some courts did just that.<sup>5</sup>

The 2005 Session of the General Assembly amended §§ 19.2-316.2(A)(3) and 19.2-316.3(A)(3) (the “2005 Amendments”) to provide that “[a] sentence to the [Detention Center] [Diversion Center] Incarceration Program shall not be imposed as an addition to an active sentence to a state correctional facility.”<sup>6</sup> Thus, after the effective date of the 2005 Amendments, a court could not sentence a defendant to the Department while also imposing a sentence to one of the Programs.<sup>7</sup> The 2005 Amendments effectively ended the authority for a court to utilize a Detention or Diversion Center as a bridge between confinement with the Department and release into the community.

The principle objective when interpreting a statute is to determine and give effect to the legislative intent.<sup>8</sup> “The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms.”<sup>9</sup> Where a statute is not ambiguous the rules of statutory construction are not necessary, and the statute is given effect in accordance with its plain meaning.<sup>10</sup>

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<sup>1</sup> See VA. CODE ANN. § 19.2-316.2 (2008).

<sup>2</sup> See § 19.2-316.3 (2008). Both of these Programs provide regimented environments with demanding structured programs. See *Word v Commonwealth*, 41 Va. App. 496, 503, 586 S.E.2d 282, 285 (2003).

<sup>3</sup> Sections 19.2-316.2(A); 19.2-316.3(A).

<sup>4</sup> See §§ 19.2-316.2, 19.2-316.3 (2004).

<sup>5</sup> See, e.g., *Rhodes v Commonwealth*, 45 Va. App. 645, 647, 613 S.E.2d 466, 467-68 (2005) (noting that trial court imposed three year active sentence to be followed by Detention and Diversion Centers).

<sup>6</sup> See 2005 Va. Acts chs. 512, 580, at 703, 704, 769, 770, respectively (amending § 19.2-316.2(A)(3)); see *id.* ch. 604, at 799, 800 (amending § 19.2-316.3(A)(3)).

<sup>7</sup> It is important to note that a sentence of one year is a sentence to the Department, while a sentence of twelve months is a jail sentence. Compare VA. CODE ANN. § 53.1-20(B) (2005) (mandating that persons convicted of felonies and sentenced to the Department or to confinement in jail for year or more are placed in custody of the Department and received into state corrections system) with § 53.1-21(B)(3) (2005) (providing that no persons convicted of misdemeanors or felonies who receive jail sentences of twelve months or less will be committed or transferred to custody of the Department without consent).

<sup>8</sup> See 1998 Op. Va. Att’y Gen. 3, 4.

<sup>9</sup> *Vollin v Arlington Co. Electoral Bd.*, 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976), quoted in 1998 Op. Va. Att’y Gen., *supra* note 8, at 4.

<sup>10</sup> *Ambrogi v Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); 1999 Op. Va. Att’y Gen. 150, 151.

The legislative intent of § 19.2-316.2 is to provide one of a number of “alternative sentencing sanctions to the trial courts in the form of a state-wide community based system of programs.”<sup>11</sup> Both the Detention Center and the Diversion Center are intended for a defendant “who *otherwise* would have been sentenced to incarceration.”<sup>12</sup> While the nature of the conviction determines the individual’s eligibility for the Programs, the ascertainment of his suitability after evaluation is specific to the individual.<sup>13</sup> Therefore, the primary factor in determining whether the defendant is admitted to the Detention or Diversion Center is based on determinations peculiar to the person, not to the offense. It is my opinion that the legislative intent is to divert the person away from traditional incarceration with the Department. The Programs are not designed to authorize incarceration with the Department for one criminal offense while diverting the defendant to the Detention or Diversion Center for another conviction.<sup>14</sup>

Finally, I cannot conclude that the General Assembly has intended to allow one court to undo another court’s sentence by imposing an active sentence after a defendant is sentenced to a Detention or Diversion Center by another court. Similarly, I cannot conclude that the General Assembly intended to allow one court, by first imposing an active sentence to the Department, to preclude another court’s finding for incarceration in either a Detention or Diversion Center. Thus, where different courts make contrary conclusions about incarceration in the Detention Center and with the Department, the Department must give effect to the sentencing orders of both courts.

### Conclusion

Accordingly, it is my opinion that the General Assembly intended that a court should not sentence the same defendant to active incarceration with the Department of Corrections and to the Detention Center Incarceration Program or the Diversion Center Incarceration Program. It further is my opinion that in a situation where one court imposes a Detention or Diversion Center sentence that would be countermanded by another court’s sentence for incarceration with the Department, the Department must give effect to the sentences imposed by both courts. This is so notwithstanding the general legislative intent that a Detention or Diversion Center sentence is an alternative to an active sentence and should not be imposed as a “bridge” between a prison sentence and release into the community.

Thank you for letting me be of service to you.

Sincerely,



William C. Mims  
Acting Attorney General

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<sup>11</sup> *Peyton v Commonwealth*, 268 Va. 503, 509, 604 S.E.2d 17, 20 (2004).

<sup>12</sup> Sections 19.2-316.2(A), 19.2-316.3(A) (emphasis added).

<sup>13</sup> See §§ 19.2-316.2(A)(1)-(3), 19.2-316.3(A)(1)-(3).

<sup>14</sup> Confinement in a Detention Center is incarceration. See *Charles v Commonwealth*, 270 Va. 14, 18, 613 S.E.2d 432, 434 (2005). The Detention Center is an alternative sanction to the traditional penal confinement in a Department prison. See *Peyton*, 268 Va. at 509, 604 S.E.2d at 20.