Hello Folks and welcome back to the Good Judge-Ment podcast. I am Wade Padgett.

*And I am Tain Kell. We really appreciate you listening to the Good Judge-Ment Podcast.*

Tain, you know that we always seem to learn as much from heading up NJO as the participants learn from us.

*That’s right. One of the benefits of leading NJO all these years is that we are always updating ourselves on the law. And we learn things from the class participants too!*

Absolutely. Today’s episode is an example of one of those topics I was not keenly aware of and that was recently utilized in Augusta following a jury trial conviction. Shout out to my awesome summer intern, Mr. J.B. Bryant, for his help is conducting some of the research for this episode.

Tell the folks what we are talking about today, Tain.

*Today, we are talking about departing from mandatory minimum sentences – focused on violent felony cases.*

**O.C.G.A. § 17-10-6.1 Sentencing of persons convicted of serious violent felonies**

Serious violent felony means:

* Murder or felony murder
* Armed robbery
* Kidnapping
* Rape
* Aggravated child molestation
* Aggravated sodomy
* Aggravated sexual battery

§ 17-10-6.1(e) “In the court’s discretion, the judge may depart from the mandatory minimum sentence specified in this Code section for a person who is convicted of a serious violent felony ***when the prosecuting attorney and the defendant have agreed*** to a sentence that is below such mandatory minimum.

Why would the parties want to even get involved with such an agreement?

Start with example:

In a murder case, we know the maximum sentence is life without parole – but also possible to sentence to life with the possibility of parole

We know that if a sentence of life (with parole) is imposed, no portion of that sentence can be probated.

We also know that the parole guidelines (and statute – O.C.G.A. § 17-10-6.1(c)) require defendant to serve 30 years before being considered for parole in life sentence

So let’s assume the defendant is willing to plead guilty if the sentence can dip below that minimum life sentence. The plea would ease burden on victim’s family, remove possibility of a not guilty verdict, etc.

If the parties agree to a sentence of 25 years to serve with life on probation, the defendant gets the benefit of being guaranteed his/her release in 25 years instead of only being potentially eligible for parole in 30 years

O.C.G.A. § 17-10-6.1(c)(4) specifically requires no parole if defendant convicted of serious violent felony (defined above) and receives something other than a life sentence

Note that the court cannot deviate without the agreement of the prosecutor and defendant – no requirement of specific findings to be included

There are other provisions relating to departing from mandatory minimum sentences we should also look at and discuss.

These statutes are similar but also quite different from the serious violent felony statute

**TRAFFICKING IN ILLEGAL DRUGS**

**§16-13-31(g)(2)**

*(There is another subsection, §16-13-31(g)(1) that allows DA to move for a reduced or suspended sentence for “substantial assistance” and allows for in camera hearing. Not really what we are focused on in this episode)*

(g)(2)(A) **In the court's discretion**, the judge may depart from the mandatory minimum sentence specified for a person who is convicted of a violation of this Code section as set forth in subparagraph (B) of this paragraph if the judge concludes that:

(i) The defendant was not a leader of the criminal conduct;

(ii) The defendant did not possess or use a firearm, dangerous weapon, or hazardous object during the crime;

(iii) The criminal conduct did not result in a death or serious bodily injury to a person other than to a person who is a party to the crime;

(iv) The defendant has no prior felony conviction; and

(v) The interests of justice will not be served by the imposition of the prescribed mandatory minimum sentence.

**Under this statute, there are limits to how far the court can depart from the mandatory minimums as set forth in (g)(2)(B) *(based upon the weight, type of drug, etc.)***

(C) If a judge reduces the mandatory minimum sentence pursuant to this paragraph, the judge shall specify on the record the circumstances for the reduction and the interests served by such departure. Any such order shall be appealable by the State of Georgia pursuant to Code Section 5-7-1.

**Also:**

(3) In the court's discretion, the judge may depart from the mandatory minimum sentence specified in this Code section for a person who is convicted of a violation of this Code section when the prosecuting attorney and the defendant have agreed to a sentence that is below such mandatory minimum.

**This provision would not require the findings that are required if the court departs without the state’s consent.**

See *Gage v. State*, \_\_ Ga. App. \_\_, 856 S.E.2d 440 (2021) which specifically provides that even where the judge finds the factors to have existed, the law does not require the judge to exercise the discretion and depart from the guidelines

**SEXUAL OFFENSES**

**§ 17-10-6.2 Sentencing of persons convicted of a sexual offense**Sexual offense means:

* Aggravated assault with intent to rape
* False imprisonment if victim is less than 14
* Sodomy
* Statutory rape if person convicted is 21 or older
* Child molestation
* Enticing a child for indecent purposes
* Improper sexual contact by employee or agent
* Incest
* Second or subsequent conviction for sexual battery
* Sexual exploitation of children

*(This is the same statute that requires split sentences in sexual offenses of at least one year on probation)*

§ 17-10-6.2 (c) in court’s discretion court may deviate from the mandatory minimum sentence when the prosecuting attorney and defendant have agreed to a sentence below such mandatory minimum ***or*** provided that:

1. Defendant has no prior conviction of an offense prohibited by 16-6 or 16-12-3(2).
2. Defendant did not use a deadly weapon
3. Court has not found evidence of a relevant similar transaction;
4. Victim did not suffer any intentional physical harm during the commission of the offense;
5. The offense did not involve the transportation of the victim; and
6. Victim was not physically restrained during the commission of the offense.

(2) If the court deviates in sentencing pursuant to this subsection, the judge shall issue a written order setting forth the judge's reasons. Any such order shall be appealable by the defendant pursuant to Code Section 5-6-34, or by the State of Georgia pursuant to Code Section 5-7-1, unless the sentence imposed was pursuant to an agreement by the prosecuting attorney and the defendant.

Under the sexual offenses, if the court departs from mandatory minimums, the court must enter written findings and specifically address the 6 factors set forth under § 17-10-6.2 (c) ***if the sentence is not part of an agreement between the parties***

The court is allowed the discretion to deviate from the mandatory minimum under two circumstances: 1) where parties agree or 2) on the court’s own motion

If the court is departing from mandatory minimums upon his/her own discretion, the required findings must be entered ***in writing.*** *Daniels v. State*, 344 Ga. App. 190, 192 (2018); *McCranie v. State*, 335 Ga. App. 548 (2016)

If the court is departing on its own motion, both sides have the right to appeal

Assumedly, the defendant would appeal if the court simply refused the exercise the discretion (see *Tindell v. State*, 314 Ga. App. 91 (2012). The state can appeal when it believes either a) the facts did not meet the required findings; or b) the court did not enter written findings as required by the statute.

*Hedden v. State,* 288 Ga. 871 (2011):

**Facts:** Defendants pled guilty to multiple counts of sexual exploitation of children by knowingly possessing photographic images stored in their computers that depicted a minor’s body engaged in sexually explicit conduct. The possibility of a less stringent sentence is foreclosed if the victim was “physically restrained during the commission of the offense.” The defendants’ computers had at least one picture depicting children being physically restrained during sexually explicit conduct. Based on presence of those pictures, the trial court concluded that the defendants were not eligible to be considered for deviation from the mandatory minimum prison sentences.

Statutory scheme in § 17-10-6.2, a trial court is prohibited from withholding any of the mandatory term of imprisonment stated for any of the specified offenses. However, if certain factors are found (listed above), a sentencing court is given the discretion to deviate from the mandatory minimum prison sentence; all of the factors stated must be present to authorize a court to deviate from the mandatory minimum sentence.

**Issue:** Whether the factor of possession of a photographic image of a victim being restrained precludes deviation from mandatory minimum sentencing under OCGA § 17-10-6.2(c)(1)(F).

**Reasoning:** “Factor (F) precludes the trial court from exercising sentencing discretion when the victim was ‘*physically restrained during the commission of the offense*.’”

Appellants were charged with possession of material in violation of § 16-12-100(b)(8). Therefore, it would have to be shown that the child victims in the images were physically restrained at the same time that the appellants possessed the offending material in order for OCGA § 17-10-6.2(c)(1)(F) to exclude the trial court from having the sentencing discretion set forth in OCGA § 17-10-6.2(c)(1).

**Conclusion:** Trial court erred in determining that it was without discretion to deviate from the minimum sentencing requirements of § 17-10-6.2(b) because there was no such evidence the child victims in the images were physically restrained at the same time the defendants possessed the offending material.

Once again, there is no requirement that the court exercise its discretion and depart from mandatory minimum sentence – only that the court actually exercise the discretion (See *Gage v. State* discussed above in trafficking section)

This is a recurring issue – when judges “announce” their policy of not giving a first offender sentence on certain offenses, etc. It is an abuse of discretion to not actually use discretion!

Thank you for listening to the Good Judge-Ment Podcast.

*Remember, if a statute gives the judge discretion, please ensure that the record shows that the judge is aware of the discretion and has elected not to do the thing that the statute provides the discretion to do-assuming that was your decision*

That is correct – it is an abuse of discretion to refuse to exercise the discretion. The judge can decline to exercise the discretion, but cannot refuse to ever consider the discretionary act.

This episode was also the product of requests made by our listeners. Please continue to help us help you by providing input and suggestions for episode topics at [goodjudgepod@gmail.com](mailto:goodjudgepod@gmail.com). You can visit our website, goodjudgepod.com for the episode notes from this and all other episodes.

*Again, thanks for listening to the Good Judge-Ment Podcast. And remember…*