

BLOG POST

Governors, Golden Globes, and the warbling of a drunken songbird

January 13, 2015

I don't usually do New Year's resolutions because there are just far too many things that I could improve on. I haven't touched a guitar in months, my pool-playing skills have deteriorated, and my singing probably sounds like the [warbling of a drunken songbird](#). I have no idea how to [sew mittens for injured Koala bears](#), I don't know how to craft supplemental [pouches for downtrodden kangaroos](#), and I'm nowhere near as proficient at [getting results as Liam Neeson](#). I haven't even started figuring out how to make a Pinewood Derby car – which near as I can tell is an operational and terrifying test of parental fitness. (Yes, it's true. One look at the child [with the Bambi eyes](#) and I'm suddenly a carpenter. Pretty sure this what happened to Noah.)

But I imagine that coming up with New Year's resolutions are particularly hard when you kick off 2015 staring down a two-year prison sentence for public corruption, [like former Virginia governor Robert McDonnell](#). The former governor, once looked at as a possible presidential candidate, suffered a dizzying fall from grace when he was convicted of "seeking to trade [official favors and the prestige of the governor's office](#) for more than \$165,000 worth of gifts and loans from Richmond-area businessman Jonnie Williams."

Revisiting the trial – and the governor's core defense that painted his co-defendant wife Maureen as a ["gold-digger," a "starry-eyed romantic,"](#) and a ["frosty harridan with a roving eye and a lamentable inability to manage the staff"](#) – is more of a matter for a psychiatrist, divorce lawyer, or at the very least a [professional cuddler](#). (You read that correctly. Professional cuddler. I did not make that up.) What I'd like to do instead is talk about how a sentence that was predicted to be [as high as 10 to 12 years](#) became a term of just 24 months.

(Before we get there, I'd just like to point out that "Frosty Harridans and the Roving Eyes" may just be the best band name ever. I take it back: it is. Game over. It's not even close.)

Ahem. Anyway. In federal court, sentences are largely driven by the [United States Sentencing Guidelines](#), which attempt to remove the variability between sentences handed down in district courts across the country. The Guidelines assign somewhat arbitrary "levels" to common elements of criminal activity – elements common to white collar crime, for example, include things like loss amount, the number of victims of a criminal scheme, and the number of participants in a criminal scheme (the higher the loss, number of victims, or number of participants, the more severe the sentence). The levels, in turn, correspond with narrow ranges of terms of imprisonment, like 37-46 months, 46 to 51 months, and so on. So in essence, the Guidelines generally provide that a criminal that steals a total of \$1 million from one person will

receive a lighter sentence than a criminal that steals a total of \$1 million from ten people – and a criminal that employs five other people to steal a total of \$1 million from one person will get the highest of the three sentences. The intent of the Guidelines is that this mechanical calculation be the same in any district court in any part of the country rendering at least some homogeneity and predictability in federal sentences.

So what happened to this rote mathematical calculation in the McDonnell case? Well, judicial discretion jumped into the mix like [***Benedict Cumberbatch into a Golden Globes selfie***](#). (Aside: Benedict Cumberbatch is *everywhere* right now, isn't he? He's not even playing human roles – he was the wolf in the Penguins of Madagascar and he was Smaug in parts two and three of "The Hobbit. And speaking of The Hobbit, *no wonder* the humans were so despondent when Smaug razed Laketown – these sharp tools built a town under a mountain *where a dragon lived*. Ain't nobody gonna insure that!) Anyway, while the Guidelines [***were once mandatory***](#), they are now advisory. So while a court must consider them, a court may also depart from them – upward or downward – based on the broad factors set out in [***18 U.S.C. § 3553***](#), which include the "history and characteristics of the defendant." That permits justice to be narrowly tailored to each particular criminal defendant in each particular case, even if it does expand the variability between sentences for similar crimes across the country.

So McDonnell, like other defendants, could argue beyond the calculation of loss or a few other factors and open the door from a sentence that required imprisonment into one that could permit a term of probation. (In fact, McDonnell's defense team argued for a sentence of community service and no imprisonment, which may have been a bigger stretch than [***J-Lo's Golden Globes dress***](#) given other [***comparable public corruption sentences***](#).) [***McDonnell was able to submit***](#) more than 400 letters in support of his character and even present the testimony of former Virginia governor L. Douglas Wilder to establish that minimal punishment was sufficient to satisfy the interests of justice. And that crucial showing was enough to convince the court to impose a sentence three to four times lower than what the government had requested.

The Guidelines are always under revision or consideration – most recently (and notably) [***for drug offenses***](#), but now for [***white collar sentences***](#), too – and the U.S. Commission is transparent about its intentions (unlike the sneaky makers of [***Cadbury Crème Eggs***](#)!). So improving the mathematical calculation is always a priority. But the ability of a defendant to appeal for a court's clemency, notwithstanding whatever calculation the Guidelines provide, underscores the importance of great advocacy.

Or really terrific professional cuddling.