D.C. Criminal Code Reform Commission

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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety
From: Criminal Code Reform Commission (CCRC)
Date: February 17, 2017
Re: Testimony for the February 9, 2017 Oversight Roundtable on *Sentencing in the District of Columbia: Agency Roles and Responsibilities*

Dear Chairman Allen,

Thank you for the opportunity to provide testimony to the Committee on the Judiciary and Public Safety for the record of the public oversight roundtable on *Sentencing in the District of Columbia: Agency Roles and Responsibilities* held on February 9, 2017. I write on behalf of the Criminal Code Reform Commission (CCRC).

The CCRC is a small, independent agency in District government that began operation on October 1, 2016. The CCRC's mission is to prepare comprehensive recommendations for the Mayor and Council on reform of the District's criminal statutes. Specifically, the CCRC's work is focused on developing possible reforms to the District's "substantive" criminal statutes,[1] i.e., District laws that define crimes and punishments, such as theft.

CCRC Role and Responsibility Regarding Sentencing

The CCRC's role and responsibility regarding sentencing follows from the five main ways that the District's substantive criminal laws affect sentencing:

1. Substantive laws state <u>what kind of sentences</u> (imprisonment and/or fines) may be applied at sentencing;
2. Substantive laws state the <u>maximum penalties</u> that may be applied at sentencing;
3. Substantive laws sometimes state the <u>minimum penalties</u> that must be applied at sentencing;

[1] Please note, however, that attempting to distinguish "substantive" and "procedural" laws is sometimes not feasible or useful. For example, laws controlling consecutive and concurrent sentencing and the overall proportionality of penalties combine considerations of what crimes and punishments should be, with questions of what the legal process should be.

4. Substantive laws limit the number of sentences that may be applied at sentencing, insofar as the substantive laws determine the number of charges that the defendant's conduct gave rise to; and
5. Substantive laws sometimes state whether the penalties that may be applied at sentencing must run consecutively or concurrently in a multiple-count case.

To the extent the CCRC develops recommendations to the Council and Mayor for reform of these aspects of the District's substantive criminal laws, the agency will be involved in making recommendations to change laws affecting sentencing in the District. (To be clear, the CCRC is not an enforcement agency and is not involved in any aspect of the practice of sentencing. Nor is the CCRC authorized to make legislative decisions or issue sentencing guidelines affecting sentencing. The agency is only concerned with issuing recommendations to the Council and Mayor for reform of the District's criminal laws.)

The first three of the above-listed ways that substantive criminal laws affect sentencing are intuitive and fairly well-known. Crimes in the D.C. Code always state, though sometimes indirectly,[2] the kind of penalty that a person may receive for committing a particular crime and the maximum penalty. And, sometimes, crimes in the D.C. Code state a minimum penalty. Because the CCRC's statutory mandate specifically requires the agency's reform recommendations to "adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties," it will consider whether to recommend changes to the type of penalty, penalty maximums, and penalty minimums for various offenses. Any recommended changes to the applicable penalties, if subsequently adopted into law by the Council, could significantly affect sentencing for those crimes in the District.

However, the ways the substantive criminal law determines *how many* sentences must be applied at sentencing (#4, above), and whether sentences run *consecutively or concurrently* (#5, above), are less well understood and merit some explanation.

Regarding *how many* sentences a defendant may face at sentencing, a prosecutor's application of the District's substantive laws to the defendant's alleged conduct determines, in the first instance, the number of charges that can be brought in a case. If all possible charges are brought by the prosecutor and proven at trial, the number of sentences a defendant faces will depend on the upper limit of the substantive law. (Of course, the number of charges that can be brought is a matter of prosecutorial discretion in the sense that the prosecutor may choose *not* to charge some or all of the crimes that could be applied to the defendant's conduct. Such exercise of

[2] To determine the penalty for an offense may require analysis of multiple statutory sections, such as those specifying applicable penalty enhancements (see, e.g. D.C. Code § 22-4502 Additional penalty for committing crime when armed) or the default penalty for attempts to commit crimes (see D.C. Code § 22-1803).

prosecutorial discretion in charging fewer or less serious crimes is essential to the practice of plea bargaining, which accounts for the disposition of most cases in the District.[3])

The substantive law's limit on the number of charges that can be brought in a case is a function of how the defendant's conduct matches: 1) The elements of a particular crime; and 2) The overlap between crimes. Here "the elements of a particular crime," means the facts that must be proven true to be found guilty of the crime. Here "overlap between crimes," means the existence of criminal liability under two or more distinct crimes for the same conduct of the defendant.

An example demonstrates how the elements of a particular crime and overlap between crimes together establish the upper limit on how many charges a prosecutor may bring. Consider the District's theft statute, D.C. Code § 22-3211, which criminalizes taking the property of another with intent to deprive that person of their right to the property, and the District's receiving stolen property (RSP) statute, D.C. Code § 22-3232, which criminalizes possessing or obtaining control of stolen property, knowing it was stolen. A prosecutor who believed that a defendant took another person's umbrella by mistake could not be charged with either crime because the defendant didn't have the mental state which is one of the elements of theft and RSP crimes. However, if the prosecutor believed the defendant took another person's umbrella purposely, intending to keep it, then the prosecutor could charge *both* theft and RSP offenses under current District law because the crimes overlap—at least in the circumstances described here.[4] As a practical matter, it is up to the prosecutor whether he or she wishes to charge both theft and RSP for typical thefts by taking.

Because the CCRC's statutory mandate specifically requires the agency's reform recommendations to "describe all elements, including mental states, that must be proven" and "reduce unnecessary overlap and gaps between criminal offenses," the agency will consider whether to recommend changes to the current statutory elements of theft and RSP or redress the overlap between the offenses. Any such changes to the elements of an offense or reducing the overlap between offenses will determine at the most basic level how a defendant's liability can be assessed—i.e., how the wrongful conduct is analyzed for purposes of criminal law. Consequently, any recommended changes to the description of offense elements in theft or RSP, or redressing their overlap, if subsequently adopted into law by the Council, could significantly affect sentencing for those crimes in the District.

Turning to the relationship between substantive law and consecutive or concurrent sentencing (#5, above), it is critical to note that most substantive offenses in the D.C. Code do not place

[3] *District of Columbia Courts Statistical Summary, Calendar Year 2016*, at 12, available online at: http://www.dccourts.gov/internet/documents/Statistical-Summary-CY2016-Final.pdf.

[4] Of course, overlapping offenses need not, and usually don't, describe exactly the same conduct. So, a person can be guilty of receiving stolen property but not theft, for example where a person buys a designer watch from a seller, believing the watch was stolen.

constraints on whether the penalty must be applied consecutively or concurrently to other offenses. Most often, the matter is left to judicial discretion.[5] However, one exception is D.C. Code § 22-3203, which controls many of the District's overlapping theft-type property offenses (including both theft and RSP), and states that while multiple convictions (and sentences) arising from the same act are allowed, the sentences shall not be consecutive.[6] The effect of this provision for theft-type offenses is to shield defendants from the penalty exposure they would otherwise be exposed to if charged with overlapping offenses. In instances where two separate, overlapping offenses must be maintained, making convictions run concurrently effectively reduces the consequences of that overlap at sentencing.

Because the CCRC's statutory mandate specifically requires the agency's reform recommendations to "adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties," and to "reduce unnecessary overlap and gaps between criminal offenses," it will consider whether to recommend changes to which offenses can be consecutively or concurrently sentenced. Requiring concurrent sentencing is one remedy for overlapping offenses that aim at redressing essentially the same social harm, just as requiring consecutive sentencing can ensure that different social harms addressed by overlapping offenses are each penalized. But, such recommendations regarding consecutive and concurrent sentencing can radically affect the liability a defendant faces at sentencing in multi-count cases.

In sum, the CCRC is responsible for development of recommendations to the Council and Mayor to reform the District's criminal laws. If adopted into law by the Council, the CCRC's recommendations could significantly affect sentencing by changing the number, kind, maximum, minimum, and sequencing of penalties that apply in a given case.

In closing this section, it should be noted that the practical effect of changes to the District's substantive criminal laws on sentencing will not depend solely on the nature of the recommendations (e.g., how offenses can be charged together and sentenced at the extremes, high and low). Rather, the practical effect of such changes also will depend on how prosecutors and judges choose to exercise their discretion within the new framework of reformed substantive laws. It is conceivable that criminal code reform could significantly rationalize and clarify the District's substantive criminal laws without significantly shifting sentencing outcomes in practice—if the new framework of reformed substantive laws allows prosecutors and judges sufficient flexibility. However, it is not possible to assess the practical effect of changes to substantive criminal laws on sentencing without full and accurate data on the current criminal

[5] However, if a court fails to state whether the sentencing for different charges runs consecutively or concurrently, D.C. Code § 23-112 specifies that sentences will run consecutively. Note, also, that the District's Voluntary Sentencing Guidelines contain rules guiding most decisions about which offenses should be sentenced consecutively (e.g. multiple crimes of violence) and concurrently (e.g. multiple non-violent crimes). See D.C. Sentencing Commission Voluntary Sentencing Guidelines Manual Chapter 6.

[6] D.C. Code § 22-3203.

justice adjudication process. As noted below, obtaining such data has been a challenge for the CCRC.

CCRC Plans Regarding Sentencing

The CCRC has developed a full Work Plan and Schedule regarding its planned activities through September 2018 which was included in its 2016 Annual Report to the Council.[7]

Under the Work Plan, the CCRC will produce two major reports for the Council and Mayor that provide recommendations for criminal code reform. The CCRC's first major report, to be issued mid-2017, will provide recommendations for enactment of D.C. Code Title 22 and other, mostly technical, changes to criminal statutes. It will also include draft legislation for implementing the CCRC's recommendations. The CCRC's second major report, to be issued by the statutory deadline of September 30, 2018, will provide recommendations for reform of the most serious and frequently sentenced District offenses currently in use. The second report will also include a concise commentary (suitable for adoption as legislative history) that explains how and why the reformed statutes change existing District law, and provide charging, sentencing, and other relevant statistics regarding affected offenses.

In preparing its reform recommendations for both major reports, the CCRC will consult with its statutorily-created Advisory Group. The Advisory Group will review, comment, and ultimately vote on all CCRC recommendations that go to the Council and Mayor. The final recommendations in both major reports will be based on the Advisory Group's comments, and a copy of those comments will be appended to the reports. In preparing its reform recommendations, the CCRC also will review criminal code reforms in other jurisdictions, recommend changes to criminal offenses by the American Law Institute, and survey best practices recommended by criminal law experts.

The CCRC's overall development of code reform recommendations will follow four sequential (though overlapping) phases, though only the latter three phases concern recommendations that may bear significantly on sentencing.

- During Phase 2, the CCRC will develop recommendations for a "general part" to the District's reformed criminal code that provides a standard toolkit of rules, definitions, and principles for establishing criminal liability that will apply to all reformed offenses. In a section of this general part, the CCRC will develop a coherent classification scheme for grading offenses and setting penalties, as well as penalty enhancements that apply to many or all offenses. Such a classification scheme for offense penalties would align the District with the majority of jurisdictions nationally and make comparison of (and

[7] The CCRC 2015 Annual Report is available online at: https://ccrc.dc.gov/page/ccrc-documents.

adjustments to) penalties more uniform. The general part will also include recommendations for a standard approach to consecutive and concurrent sentencing and merger of offenses.

- During Phase 3, the CCRC will develop recommendations for modernizing the structure and language of the most serious, frequently-sentenced District offenses, consistent with the general definitions, rules, and principles for establishing liability established by the general part. As part of this work the CCRC recommendations will clarify the elements of offenses, reducing offense gaps and overlap. Additional gradations in liability may be recommended in this phase for some offenses.

- In Phase 4, the CCRC will review all reformed offenses together as a whole, with an eye to improve penalty proportionality. The agency will first create an ordinal ranking of offenses and gradations by severity. Then, using the ordinal ranking, the CCRC will assign a penalty class to individual offenses. The agency's final recommendations for offense penalties may be comprised of two or more alternative sets of penalties for Council consideration.

Throughout its work developing recommendations on substantive criminal laws relevant to sentencing, the CCRC will seek to acquire and analyze relevant criminal data. The CCRC statute requires the agency to provide "charging, sentencing, and other relevant statistics" with its final recommendations to the Council and Mayor. However, such statistical information is also critical to the initial development of recommendations. For example, the sentences for a specific offense may show what District judges believe to be a proportionate penalty for that offense. To acquire data, the CCRC is statutorily authorized to request information from other District agencies, and a major data request was made of the D.C. Sentencing Commission in the first quarter of FY 17. At this time the CCRC has received some data from the D.C. Sentencing Commission and has begun working with social scientists in the Office of the City Administrator to analyze that data.

Possible Resources & Topics to Explore to Improve Sentencing

While the CCRC has not yet developed its recommendations on substantive criminal laws that bear on sentencing, as discussed above, the agency's preliminary work on these matters has identified a number of resources and topics relevant to sentencing that may benefit the Council's future work.

First, the CCRC wishes to note that over the last decade nearly three dozen states have undergone reviews of their criminal sentencing systems through the Justice Reinvestment Initiative (JRI) process. With funding and expertise by the Department of Justice's Office of

Justice Programs,[8] the Urban Institute,[9] the Pew Charitable Trusts,[10] the Vera Institute of Justice,[11] and other organizations, state and local jurisdictions have undergone a variety of data-driven, evidence-based reforms to improve public safety while reducing incarcerated populations and costs. The JRIs have particular experience working with jurisdictions to optimize their use of offender risk-assessment tools and policies on parole and supervised release. The national organizations involved in the JRIs have offices in the District and have created a robust set of recommendations and research that may be applicable to the District.

Second, the CCRC commends to the Council's attention the new,[12] wide-ranging recommendations of the American Law Institute (ALI) on sentencing. The ALI is the leading independent organization in the United States producing scholarly work to clarify, modernize, and improve the law.[13] Over the past fifteen years the ALI's Model Penal Code Project on Sentencing—which has included several District judges, academics, and practitioners—has developed new recommendations for legislatures regarding sentencing commissions and sentencing guidelines. These recommendations differ significantly from current District law and practice insofar as they favor "presumptive" sentencing guidelines that have some legal authority, compared to the District's purely voluntary sentencing guidelines which are not binding on judges. However, the ALI reporters also drafted many recommendations to be compatible with voluntary sentencing jurisdictions such as the District.[14]

Third, the CCRC suggests that one of the ALI's sentencing recommendations merits particular consideration—legislatively requiring sub-constitutional, substantive appellate review of sentences. Key components of the ALI's model statutory provisions are:

- Specifying by statute the general purposes of criminal sentencing;
- Requiring sentencing judges to provide a statement of reasons for their sentencing decisions;
- Establishing a right of appeal where a sentence is "too severe or lenient, or is otherwise inappropriate in light of the purposes" of criminal sentencing; and,
- Granting both defendants and the government such a right of appeal.

Presently, a single sentencing judge's exercise of discretion in imposing a sentence within the statutory bounds (i.e., within the statutory maximum and any minimum) is not reviewable with

[8] For more information, see https://www.bja.gov/programs/justicereinvestment/index.html.
[9] For more information, see http://www.urban.org/policy-centers/justice-policy-center.
[10] For more information, see http://www.pewtrusts.org/en/projects/public-safety-performance-project.
[11] For more information, see https://www.vera.org/.
[12] While the ALI Sentencing Project is expected to be completed this spring of 2017, nearly all its draft recommendations (including those regarding sentencing commissions, sentencing guidelines, and appellate review of sentencing decisions) have already been through the organization's review process and fully adopted.
[13] For more information, see www.ali.org.
[14] Model Penal Code: Sentencing § 1.02(2) (Tentative Draft No. 4 April 11 2016). For the current status of ALI draft materials, *see* The American Law Institute, Sentencing https://www.ali.org/projects/show/sentencing/.

respect to its proportionality.[15] Even with perfect information, an individual judge may make a mistake. Having a check on a trial judge's sentencing discretion may be an appropriate way to avoid sentences that exceed or undercut District norms.

Fourth, to the extent that discussions about the Youth Rehabilitation Act (YRA) or other possible changes to District sentencing rely upon the distinction between "violent" and "non-violent" crime, the CCRC recommends that the legal definition of "crime of violence" in D.C. Code § 23-1331(4) be carefully scrutinized.[16] Based on an initial review by the CCRC, the current definition may be both over-inclusive (including offenses that don't routinely cause significant physical harms to persons),[17] and under-inclusive (excluding offenses that do routinely cause significant physical harms to persons).[18] Lastly, it may be that any single definition for crimes of violence lacks sufficient precision. The current crime of violence definition equates felony assault (normally carrying a three year maximum imprisonment sentence), with aggravated forms of murder and sex abuse (normally carrying a sixty year maximum imprisonment sentence). The fact that a crime is or is not labeled a crime of violence has many ramifications,[19] and a careful review may be in order before relying further on the current definition.

Lastly, the CCRC would ask the Council to consider appropriate measures to improve the access of District agencies and the public to data regarding criminal charging and sentencing. The Deputy Mayor for Public Safety, in that office's written testimony for this Roundtable, was blunt in saying that, "[o]ur criminal justice system needs to be as open as possible with its data and open itself to evaluation from the outside." The CCRC echoes the Deputy Mayor's statement that criminal justice data needs to be made available to District agencies except where prohibited by law, and to the public through anonymized aggregate data sets. There should be no doubt that

[15] *Matter of L.J.*, 546 A.2d 429, 434 (D.C. 1988) ("The refusal of the courts of this jurisdiction to review on appeal sentences which are within statutory limits, upon the ground that such sentences are too severe, is of long standing.").

[16] D.C. Code § 23-1331(4) states: "The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses."

[17] For example, pickpocketing types of robbery, carjacking involving unoccupied vehicles, and burglary. Research indicates that the highest rates of actual violence or threats of violence in burglaries in urban areas are 7.6%. See Kopp, et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007,* ICPSR34971-v1. Ann Arbor, MI: Inter-university Consortium for Political and Social Research, September 22, 2016.

[18] For example, human trafficking offenses (Title 22, Chapter 18A) and certain sexual offenses such as compelling an individual to live life of prostitution against his or her will (§ 22–2706) or first degree sexual abuse of a minor (§ 22–3009.01).

[19] For example, crimes of violence are subject to different procedures for DNA testing and immigration detainer (see D.C. Code § 22-4132 and D.C. Code § 24-211.07) and increased liability for solicitation of the offense and repeat offender penalty enhancements (see D.C. Code § 22-2107 and D.C. Code § 22-1804(a)).

such basic information on criminal justice should be publicly available. However, even the CCRC which is working on reform of District criminal statutes and has a statute directing agencies to provide relevant information except where prohibited by law has faced obstacles obtaining anonymized criminal justice information. To improve the transparency of the District's criminal justice system, it would be helpful if it were an affirmative duty of one or more District agencies to affirmatively provide to the public reliable, detailed, system-wide information on arrests, charges, and sentences.

Thank you for the opportunity to provide this statement for the record of the public oversight roundtable on *Sentencing in the District of Columbia: Agency Roles and Responsibilities*, held on February 9, 2017.

Sincerely,

Richard Schmechel
Executive Director
Criminal Code Reform Commission