First Draft of Report #57 - Second Look

SUBMITTED FOR ADVISORY GROUP REVIEW
May 18, 2020

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrc.dc.gov

This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

This Draft Report has two main parts: (1) draft statutory text for an enacted Title 22 (Title 22E) of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision and considers whether existing District law would be changed by the provision.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

<u>The deadline for the Advisory Group's written comments on this First Draft of Report #57 – Second Look is June 19, 2020.</u>

Oral comments and written comments received after this date may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

D.C. Code § 24-403.03. Modification of an imposed term of imprisonment.

(a) Notwithstanding any other provision of law, the court shall reduce a term of imprisonment imposed upon a defendant for an offense if:
  (1) The defendant was sentenced pursuant to § 24-403 or § 24-403.01, or was committed pursuant to § 24-903, and has served at least 15 years in prison; and
  (2) The court finds, after considering the factors set forth in subsection (c) of this section, that the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.

(b)
  (1) A defendant convicted as an adult of an offense may file an application for a sentence modification under this section. The application shall be in the form of a motion to reduce the sentence. The application may include affidavits or other written material. The application shall be filed with the sentencing court and a copy shall be served on the United States Attorney.
  (2) The court may direct the parties to expand the record by submitting additional testimony, examinations, or written materials related to the motion. The court shall hold a hearing on the motion at which the defendant and the defendant's counsel shall be given an opportunity to speak on the defendant's behalf. The court may permit the parties to introduce evidence.
  (3)
    (A) The defendant shall be present at any hearing conducted under this section unless the defendant waives the right to be present. Any proceeding under this section may occur by video teleconferencing and the requirement of a defendant's presence is satisfied by participation in the video teleconference.
    (B) A defendant brought back to the District for any hearing conducted under this section shall be held in the Correctional Treatment Facility.
  (4) The court shall issue an opinion in writing stating the reasons for granting or denying the application under this section, but the court may proceed to sentencing immediately after granting the application.

(c) The court, in determining whether to reduce a term of imprisonment pursuant to subsection (a) of this section, shall consider:
  (1) The defendant’s age at the time of the offense;
  (2) The history and characteristics of the defendant;
  (3) Whether the defendant has substantially complied with the rules of the institution to which he or she has been confined and whether the defendant has completed any educational, vocational, or other program, where available;
  (4) Any report or recommendation received from the United States Attorney;
  (5) Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction;
  (6) Any statement, provided orally or in writing, provided pursuant to § 23-1904 or 18 U.S.C. § 3771 by a victim of the offense for which the defendant is imprisoned, or by a family member of the victim if the victim is deceased;
  (7) Any reports of physical, mental, or psychiatric examinations of the defendant conducted by licensed health care professionals;

(8) The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;

(9) The extent of the defendant's role in the offense and whether and to what extent an adult was involved in the offense;

(10) The diminished culpability of juveniles as compared to that of adults, and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences, which counsel against sentencing them to lengthy terms in prison, despite the brutality or cold-blooded nature of any particular crime; and

(11) Any other information the court deems relevant to its decision.

(d) If the court denies or grants only in part the defendant's 1st application under this section, a court shall entertain a 2nd application under this section no sooner than 3 years after the date that the order on the initial application becomes final. If the court denies or grants only in part the defendant's 2nd application under this section, a court shall entertain a 3rd and final application under this section no sooner than 3 years following the date that the order on the 2nd application becomes final. No court shall entertain a 4th or successive application under this section.

(e)

(1) Any defendant whose sentence is reduced under this section shall be resentenced pursuant to § 24-403, § 24-403.01, or § 24-903, as applicable.

(2) Notwithstanding any other provision of law, when resentencing a defendant under this section, the court:

(A) May issue a sentence less than the minimum term otherwise required by law; and

(B) Shall not impose a sentence of life imprisonment without the possibility of parole or release.

COMMENTARY

Explanatory Note & Relation to Current District Law. *This section establishes, for the Revised Criminal Code (RCC) and other D.C. Code provisions, authority and procedures for the court to modify a defendant's terms of imprisonment after serving at least 15 years' imprisonment. The revised statute replaces current D.C. Code § 24-403.03, Modification of an imposed term of imprisonment.*

The only changes in the revised statute as compared to the current D.C. Code provision are replacement of the phrases "offense committed before the defendant's 18th birthday" with "offense" in subsection (a) and paragraph (b)(1) of the current statute, and omitting "for violations of law committed before 18 years of age" from the statute's title.[1] For there to be a

[1] [The CCRC recommendation is based on current law. A bill now pending before the D.C. Council, B23-0127, the "Second Look Amendment Act of 2019" would extend eligibility for second look procedures to persons who committed an offense when they were under 25 years of age, among other changes. For the reasons described below, the CCRC supports not only extension of second look procedures to persons who were under 25 years of age at the time of committing the offense, but extension to persons of any age. However, the CCRC takes no position on other changes proposed in the "Second Look Amendment Act of 2019." Should the "Second Look Amendment Act of 2019" become law, the CCRC recommendation would be updated to include all amended language except for an age limitation.]

sentence modification under the revised statute a person must have served at least 15 years of their sentence and there must be judicial findings, after consideration of victim statements and other procedural requirements, that the person is not a danger to the safety of any person or the community, and that the interests of justice warrant such a sentence modification. When these stringent requirements are met, continued incarceration may be unjustifiable regardless of a defendant's age when he or she committed a crime.

The revised statute does not diminish the fact that the age when a person commits a crime remains a special factor in sentencing. For over a decade it has been well-established that adolescents are less able to understand the long term consequences of their actions and conform their behavior accordingly.[2] Moreover, the underlying brain and social development that marks adolescent criminal behavior is also common to individuals through age 24.[3] Yet, while these considerations suggest youth offenders may be less blameworthy for their conduct, there is also extensive research indicating that criminal behavior peaks in late teen years and declines from the early 20s onward.[4] Older individuals are less likely to recidivate after release than younger offenders with similar sentences.[5] These considerations undermine arguments for lengthy incarceration as being generally necessary for public safety.

More fundamentally, however, the revised statute recognizes the need for the District's criminal justice system to have a procedural mechanism to review in particular cases whether further incarceration continues to benefit public safety and serve the interests of justice after the person has served at least 15 years. This procedure helps ensure that criminal punishment decisions remain grounded in evidence and contemporary norms. As the American Law Institute (ALI)[6] recently stated in its recent recommendation for a judicial second look procedure after 15 years of time served,[7] such a policy: "is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these

---

[2] *See* Committee on the Judiciary, Report on Bill 21-0683, the "Comprehensive Youth Justice Amendment Act of 2016", (Oct. 5, 2016), available at: http://lims.dccouncil.us/Download/35539/B21-0683-CommitteeReport1.pdf ("citing Laurence Steinberg, Adolescent Development and Juvenile Justice, Ann. Rev. Clin, Psychol. 2009 5:47-73).

[3] *See, e.g. U.S. Department of Justice, National Institute of Justice, "From Juvenile Delinquency to Young Adult Offending," (March 10, 2014) (available at* https://nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending) ("[R]esearchers concluded that young adult offenders ages 18-24 are more similar to juveniles than to adults with respect to their offending, maturation and life circumstances. Changes in legislation to deal with large numbers of juvenile offenders becoming adult criminals should be considered. One possibility is to raise the minimum age for referral to the adult court to 21 or 24, so that fewer offenders would be dealt with in the adult system.").

[4] *See, e.g.* U.S. Department of Justice, National Institute of Justice, *From Juvenile Delinquency to Young Adult Offending, (March 10, 2014) (available at* https://nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending) ("The prevalence of offending tends to increase from late childhood, peak in the teenage years (from 15 to 19) and then decline in the early 20s.")

[5] *See, e.g.,* U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (December 2017).

[6] The American Law Institute is a longstanding national membership organization comprised of leading judges, legal scholars, and practitioners. In 2017, the ALI completed a multi-year review of model sentencing practices and issued new recommendations on second look procedures and other matters.

[7] Model Penal Code: Sentencing §305.6 (Am. Law Inst., Proposed Final Draft, 2017). This draft was approved by the ALI membership at the 2017 Annual Meeting, represents the Institute's position until the official text is published.

sanctions remain intelligible and justifiable at a point in time far distant from their original imposition."[8] Finality is a key component of criminal justice system decisions. However, no sentencing regime in the United States is entirely determinate and determinate sentences "are least justifiable as they extend in length from months and years to decades."[9]

Uniquely, federal law blocks other potential mechanisms the District might use to evaluate the continued benefits to public safety and justice of incarceration after 15 years. Federal law has eliminated the District's Parole Board,[10] limits Bureau of Prisons (BOP) reductions in incarceration for good behavior to a maximum of 15%,[11] and deprives the Mayor of commutation and exoneration powers ordinarily available to the head of the Executive Branch.[12] Other jurisdictions do not confront these barriers, yet several have still implemented second look provisions in addition to other mechanisms for sentence review.[13] The revised

[8] Model Penal Code: Sentencing §305.6 cmt. a (Am. Law Inst., Proposed Final Draft 2017).

[9] Model Penal Code: Sentencing §305.6 cmt. b (Am. Law Inst., Proposed Final Draft 2017). *See, also, id.* ("The passage of many years can call forward every dimension of a criminal sentence for possible reevaluation. On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods. In recent decades, for example, there has been flux in community attitudes toward many drug offenses, homosexual acts as criminal offenses, and even crime categories as grave as homicide, such as when a battered spouse kills an abusive husband, or cases of euthanasia and assisted suicide. Looking more deeply into the American past, witchcraft, heresy, adultery, the sale and consumption of alcohol, and the rendering of aid to fugitive slaves were all at one time thought to be serious offenses. It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values. The prospect of evolving norms, which might render a proportionate prison sentence of one time period disproportionate in the next, is a small worry for prison terms of two, three, or five years, but is of great concern when much longer confinement sentences are at issue. On utilitarian premises, lengthy sentences may also fail to age gracefully. Advancements in empirical knowledge may demonstrate that sentences thought to be well founded in one era were in fact misconceived. An optimist would expect this to be so. For example, research into assessment methods over the last two decades has yielded significant (and largely unforeseen) improvements. Projecting this trend forward, an individualized prediction of recidivism risk made today may not be congruent with the best prediction science 20 years from now. Similarly, with ongoing research and investment, new and effective rehabilitative or reintegrative interventions may be discovered for long-term inmates who previously were thought resistant to change. Proven and credible rehabilitative programming may become a pillar of deincarceration policy in the United States, as some contemporary advocates of "evidence-based sentencing" now expound. Twenty years or more in the future, with sturdier empirical foundations, the perceived collapse of rehabilitation theory could be substantially reversed."

[10] National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 712 (1997) ("D.C. Revitalization Act"). The District of Columbia is one of only 16 American jurisdictions without a local parole opportunity of any kind. Other jurisdictions include: Arizona, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, New Mexico, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin. In addition, California has a parole system that is limited to life indeterminate life sentences. *See* Prison Policy Initiative, *Failure should not be an option: Grading the parole systems of all 50 states*, Appendix A, (2019), available at https://www.prisonpolicy.org/reports/parole_grades_table.html

[11] 18 U.S.C. 3624(b).

[12] The District's Mayor does have a limited power to pardon certain "offenses against the late corporation of Washington, the ordinances of Georgetown and the levy court, the laws enacted by the Legislative Assembly, and the police and building regulations of the District." D.C. Code Ann. § 1-301.76. However, the extent of Mayoral power to pardon does not reach the overwhelming majority of District crimes. See *United States v. Cella*, 37 App. D.C. 433, 435 (1911) ("crimes committed [in the District of Columbia] are crimes against the United States"); U.S. Const. art. II, § 2, cl. 1 ("…he shall have Power to grant Reprieves and Pardons for Offenses against the United States").

[13] For further background information, *see* Advisory Group Memorandum #25 –"Second Look" and Related Provisions in Other Jurisdictions.

statute bypasses these obstacles by expanding current law to provide a second look for all incarcerated persons who have served at least 15 years of their sentence.

District judges are trusted to decide initial sentences of incarceration, but they are not infallible and cannot see into the future. They must work with imperfect information about potential threats to public safety, the likelihood of rehabilitation, and ever-evolving public norms about the seriousness of criminal behavior. The revised statute provides judges with an opportunity to reassess the continued justification for incarceration of an individual after 15 years of time served. This procedural mechanism helps ensure the ongoing proportionality of punishments in the District's criminal justice system.