First Draft of Report #51 – Jury Demandable Offenses

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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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.

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.

The deadline for the Advisory Group's written comments on this First Draft of Report #51 –Jury Demandable Offenses is April 15, 2020. 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 § 16-705. Jury trial; trial by court.

(b) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if:

(1) (A) The defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days (or for more than six months in the case of the offense of contempt of court);

(B) The defendant is charged with an attempt, conspiracy, or solicitation to commit an offense specified in subparagraph (b)(1)(A) of this section;

(C) The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701;

(D) The defendant is charged with a "registration offense" as defined in D.C. Code § 22-4001(8);

(E) The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States under federal immigration law; or

(F) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year; and

(2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.

COMMENTARY

Explanatory Note. *This section establishes the jury or nonjury trial provision for the Revised Criminal Code (RCC) and other D.C. Code provisions. The revised statute replaces D.C. Code § 16-705(b)(1) (Jury trial; trial by court).* The revised portion of D.C. Code § 16-705(b)(1) concerns the extension of a statutory right to a jury trial in six circumstances.

Subparagraph (b)(1)(A) of the revised statute permits a criminal defendant to demand a jury trial when charged with an offense punishable by imprisonment for more than 90 days.

Subparagraph (b)(1)(B) of the revised statute permits a defendant to demand a jury trial when charged with an inchoate form of an offense—i.e. attempt, solicitation, or conspiracy—that would be punishable by imprisonment for more than 90 days.

Subparagraph (b)(1)(C) of the revised statute permits a jury demand for a charge under Chapter 12 of Title 22E, including robbery, assault, menacing, criminal threats, and offensive physical contact, if the person who is alleged to have been subjected to the criminal offense [1] is a law enforcement officer as defined in § 22E-701.

Subparagraph (b)(1)(D) of the revised statute provides a right to a jury trial to a charge for a "registration offense" as defined under the District's sex offender registration statutes.

Subparagraph (b)(1)(E) of the revised statute extends a right to a jury for any charge[2] which, as a matter of law, could result in deportation of the defendant under federal immigration law were the defendant convicted of the crime and proven to be a non-citizen. This provision does not require any proof or assertion that the defendant is, in fact, a non-citizen or that federal authorities, in fact, would deport the defendant if convicted. The question under subparagraph (b)(1)(E) is purely a question of law—whether the charged offense could result in deportation under federal immigration law if the defendant were a non-citizen.

Subparagraph (b)(1)(F) of the revised statute provides a jury trial right to a criminal defendant charged with two or more offenses with a combined possibility of imprisonment of more than one year or more than $4,000.[3]

Relation to Current District Law. Revised D.C. Code § 16-705(b)(1) changes current District law by extending the circumstances under which a defendant is entitled to a jury trial. However, the revised statute makes no change to the process for waiver of a jury trial right, the jury trial procedure itself, or the procedures for adjudication absent a jury trial. The revised statute maintains the current language regarding the right to a jury trial where guaranteed by the United States Constitution, the current fine structure for jury demandable offenses, and the current language regarding jury demandable contempt of court cases.

In general, current D.C. Code § 16-705 establishes the circumstances under which a criminal defendant is entitled to a jury trial,[4] the process for waiving a jury trial,[5] the procedure for adjudicating cases in which a defendant is not entitled to a jury trial or a

[1] The term "complainant" is defined in RCC § 22E-701 as a "person who is alleged to have been subjected to the criminal offense," such that the phrasing here is identical to "complainant" in RCC § 22E-701.

[2] The application of federal immigration law to District statutes is complex and constantly evolving. Establishing a definitive list of the District's deportable misdemeanor offenses would be an immense and likely fruitless undertaking. Consequently, the revised statute codifies a clear, flexible standard that courts can evaluate as needed as federal law changes.

[3] *See* D.C. Code §§ 4-516 (Assessments for crime victims assistance and compensation); 16-711 (Restitution or reparation); 22-3571.01 (Fines for criminal offenses).

[4] D.C. Code §§ 16-705(a)-(b-1).

[5] D.C. Code § 16-705(a); D.C. Code § 16-705(b)(2); D.C. Code § 16-705(b-1).

jury trial is waived,[6] and the procedure for jury trials.[7] Under current D.C. Code § 16-705, a criminal defendant is entitled to a jury trial in six instances: (1) where a jury trial is guaranteed by the United States Constitution;[8] (2) where the defendant is charged with an offense punishable by a fine over $1,000;[9] (3) where a defendant is charged with two or more offenses punishable by a cumulative fine of over $4,000;[10] (4) where a defendant faces imprisonment for more than 6 months for contempt of court;[11] (5) where a defendant is charged with an offense punishable by more than 180 days imprisonment;[12] and (6) where a defendant is charged with two or more offenses punishable by imprisonment for more than two years.[13] The current statute also clarifies that when a defendant is charged with two or more offenses, if one of the offenses is jury demandable, all offenses shall be tried by jury unless waived.[14]

The revised statute changes D.C. Code § 16-705(b)(1) to expand the right of a criminal defendant to demand a jury trial in several ways. First, in contrast to the current standard of more than 180 days,[15] subparagraph (b)(1)(A) of the revised statute sets the baseline right to a jury of one's peers for a non-contempt of court charge that carries a maximum imprisonment penalty of more than 90 days. Second, in contrast to current law which makes no distinction as to whether a charge is an attempt or other inchoate form of an offense that is jury demandable, subparagraph (b)(1)(B) of the revised statute treats inchoate forms of a jury-demandable offense as jury demandable, regardless whether their imprisonment penalty is 90 days or less. Third, the revised statute creates entirely new statutory rights to a jury for any charge which, under subparagraph (b)(1)(C) or subparagraph (b)(1)(D) is an offense in Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in § 22E-701, or a charge for a "registration offense" as defined in § 22-4001(8). Fourth, the revised statute, in subparagraph (b)(1)(E), codifies a statutory right to a jury for a charge that, as a matter of law, could result in deportation were the defendant proven to be a non-citizen and convicted of the crime. This change appears to expand D.C. Court of Appeals (DCCA) case law that provides a right to a jury on constitutional grounds for a non-citizen

[6] D.C. Code §§ 16-705(a)-(b-1).
[7] D.C. Code § 16-705(c).
[8] D.C. Code § 16-705(a). According to the United States Supreme Court, a criminal defendant is entitled to a jury trial under the United States Constitution when charged with a "serious" offense, but not when charged with a "petty" offense. *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968). The Supreme Court has identified the maximum authorized penalty as the most relevant objective criteria by which to judge an offense's severity and has held then no offense may be deemed "petty" if it is punishable by more than six months imprisonment. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). Offenses punishable by six months imprisonment or less are presumptively "petty," but that presumption may be overcome if a defendant shows that additional statutory penalties, viewed in conjunction with the maximum period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is "serious." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).
[9] D.C. Code § 16-705(b)(1)(A).
[10] D.C. Code § 16-705(b)(1)(B).
[11] D.C. Code § 16-705(b)(1)(A).
[12] D.C. Code § 16-705(b)(1)(A).
[13] D.C. Code § 16-705(b)(1)(B).
[14] D.C. Code § 16-705(b-1).
[15] D.C. Code § 16-705(b)(1)(A).

defendant who is subject to possible deportation if convicted of the offense.[16] Finally, subparagraph (b)(1)(F) of the revised statute reduces from two years to one year the cumulative term of imprisonment that a defendant must be subject to under two or more charges in order to demand a jury. The one-year threshold is four times the otherwise applicable revised threshold of 90 days in subparagraph (b)(1)(A), just as the current threshold of two years is four times the otherwise applicable threshold of 180 days.[17]

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The rationale for limiting a right to a jury to offenses punishable by 180 days or less is rooted in a specific factual context that no longer exists in the District.

For most of the past century, the District has provided a more expansive jury trial right than it does today.[18] Between 1926 and 1993, criminal defendants were entitled to a jury trial in all cases punishable by a fine or penalty of $300 or more, or by imprisonment for more than 90 days.[19] In 1992, however, the D.C. Council passed the Criminal and Juvenile Justice Reform Amendment Act, increasing the penalty threshold for a jury trial more than threefold and doubling the imprisonment threshold.[20] Although this was a dramatic change to the substantive jury trial right, its impact on the actual number of jury trials in the District was minimal. As Fred B. Ugast, then Chief Judge of D.C. Superior Court subsequently explained, because the vast majority of charged misdemeanors at the time had maximum penalties of one year, the amendment did not result in a significant change in jury trial rates.[21] However, the year after the Criminal and Juvenile Justice

[16] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury."). The *Bado* decision does not explicitly state that a defendant must prove that he or she is a non-citizen in order to avail themselves of the right to a jury for a deportable offense, although this appears to be implicit in the *Bado* decision's reliance on Supreme Court precedent in *Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989)* and repeated emphasis that the *Blanton* court relied on the consequences to a *particular* defendant. *See also Miller v. United States*, 209 A.3d 75, 79 (D.C. 2019)("Although the trial record did not reveal that Ms. Miller is not a citizen, the United States has not relied on that circumstance to argue that the error in this case was not obvious for purposes of the plain-error standard. We therefore do not address that issue. … Second, the United States's proposed reading of Bado appears to rest on the premise that a defendant has a constitutional right to a jury trial only if conviction would in a practical sense make the defendant's situation worse than it otherwise would be. Bado, however, repeatedly states that the relevant inquiry is whether the defendant "faces" or "is exposed" to the penalty at issue, or alternatively whether the penalty "could be" imposed, if the defendant is convicted. E.g., 186 A.3d at 1246, 1249-50, 1252, 1253, 1256, 1257, 1261.").

[17] D.C. Code § 16-705(b)(1)(A).

[18] *See* Act of June 17, 1870, 41st Cong., (1870) (16 Stat. 153) (providing right to trial by jury *de novo* on appeal from all actions in Police Court); Act of March 3, 1891, 51st Cong., (1891) (26 Stat. 848) (providing right to trial by jury in Police Court for all cases punishable by penalty $50 or more or imprisonment for thirty days or more); Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119) (providing right to trial by jury in Police Court for all cases punishable by penalty of $300 or more or by imprisonment for more than ninety days).

[19] Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119).

[20] Criminal and Juvenile Justice Reform Amendment Act of 1992, D.C. Law 9-272.

[21] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" attached "Copy of letter dated September 20, 1993 from Chief Judge Fred B. Ugast of the

Reform Amendment Act went into effect, the Council passed the Omnibus Criminal Justice Reform Amendment Act of 1994.[22] The legislation reduced the penalties of more than forty misdemeanor offenses to remove criminal defendants' rights to demand a jury trial.[23] Today, jury trial rates in misdemeanor cases remain well below 1%.[24]

Both the Criminal and Juvenile Justice Reform Amendment Act of 1992 and the Omnibus Criminal Justice Reform Amendment Act of 1994 were passed at a time when responding to violent crime was the Council's priority as part of a conscious effort to promote expediency in the criminal process. Although there was no claim that the legislation would result in cost savings, the stated aim of the legislation was to promote judicial efficiency:

> Title V reduces the penalty of more than 40 crimes to 180 days, presumptively making them non-jury demandable. Both the Superior Court and the U.S. Attorney support this change to allow for efficiencies in the judicial process. While there would be no actual monetary savings, this change will relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow more felony trials to be scheduled at an earlier date.[25]

In 1993, the year the Criminal and Juvenile Justice Reform Amendment Act went into effect and the year the Omnibus Criminal Justice Reform Amendment Act was introduced, violent crime in the District had reached an all-time high. According to the FBI's Uniform Crime Reporting Program, rates of violent crime in the District peaked in 1993 at 2,922 per 100,000 people.[26] The D.C. Council was reaching for all available options to respond. As noted in the committee report for the Omnibus Criminal Justice Reform Amendment Act of 1994:

> Over the past few years, the Council has passed much legislation in an attempt to curtail the crime and violence in the District of Columbia. However, crime and violence continues to hold the District of Columbia within its grip. . . .

Superior Court ("Last year, the Council passed an amendment to D.C. Code §16-705(b)(1) providing for the right to a trial by jury in criminal cases where the maximum penalty exceeds 180 days incarceration or a fine of $1000 (up from 90 days and $300). Because the vast majority of charged misdemeanors currently have maximum penalties of one year, the amendment has not significantly reduced the number of jury trials in misdemeanor cases.").

[22] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[23] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[24] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor jury trials as a percentage of misdemeanor dispositions at: 0.13% in 2003, 0.15% in 2004, 0.16% in 2005, 0.10% in 2006, 0.27% in 2007, 0.18% in 2008, 0.11% in 2009, 0.10% in 2010, 0.13% in 2011, 0.23% in 2012, 0.21% in 2013, 0.09% in 2014, 0.20% in 2015, 0.07% in 2016, 0.08% in 2017, and 0.07% in 2018.

[25] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4.

[26] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

> . . . The Council in its continued fight, must look at all options to increase public safety, including redefining crimes, reviewing management, and reallocating resources.[27]

Yet, overall violent crime in the District has been in steady decline since 1993.[28] In 2018, violent crime in the District reached 996 per 100,000 people, a 66% decrease from 1993,[29] and the lowest since the 1967.[30] This decrease in violent crime rates in the District in recent decades undermines the primary rationale for prioritizing judicial expediency over due process.

In addition, the impact of expanding jury demandability on judicial resources is unclear. Assuming that both judicial and prosecutorial resources are relatively constant and inelastic in the near future, and that jury trials require greater resources than bench trials, the result of expanding jury demandability may be an increase in non-trial dispositions (plea, diversion, or dismissal) for lower level cases. This is because any judicial impact depends on prosecutorial charging decisions which are highly discretionary, dynamic, and likely to change with resource pressure.

Expansion of the jury trial right would almost certainly increase to some degree the number of misdemeanor jury trials held annually. However, the overall rate of jury trials has been variable but at historic lows in recent years. The rate of jury trials has steadily declined for decades across the United States, with jury trials making up only a small fraction of overall dispositions.[31] In the District, felony jury trial rates averaged 7% over the past 15 years,[32] with the vast majority of charges resulting in either dismissal (36%)[33] or a guilty plea (52%).[34] Similarly, the vast majority of misdemeanor cases in

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[27] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 2.

[28] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[29] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[30] Federal Bureau of Investigation, UCR Data Tool, Violent Crime Rates in the District of Columbia, 1960-2014, https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm.

[31] *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. L. Stud. 459 (2004); Brian J. Ostrom, Shauna M. Strickland, and Paula L. Hannaford-Agor, "Examining Trial Trends in State Courts: 1976-2002," Journal of Empirical Legal Studies 1, no. 3 (November 2004): 755-782.

[32] Compiled from District of Columbia Courts Annual Reports, showing felony jury trials as a percentage of felony dispositions at: 5% in 2003, 5% in 2004, 4% in 2005, 5% in 2006, 7% in 2007, 8% in 2008, 8% in 2009, 10% in 2010, 9% in 2011, 9% in 2012, 10% in 2013, 10% in 2014, 9% in 2015, 6% in 2016, 5% in 2017, and 4% in 2018.

[33] Compiled from District of Columbia Courts Annual Reports, showing felony dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of felony dispositions at: 46% in 2003, 44% in 2004, 40% in 2005, 31% in 2006, 33% in 2007, 34% in 2008, 31% in 2009, 27% in 2010, 27% in 2011, 27% in 2012, 25% in 2013, 29% in 2014, 32% in 2015, 38% in 2016, 43% in 2017, and 41% in 2018.

[34] Compiled from District of Columbia Courts Annual Reports, showing felony guilty pleas as a percentage of felony dispositions at: 34% in 2003, 35% in 2004, 28% in 2005, 62% in 2006, 59% in 2007, 58% in 2008, 60% in 2009, 63% in 2010, 63% in 2011, 62% in 2012, 64% in 2013, 59% in 2014, 58% in 2015, 56% in 2016, 51% in 2017, and 54% in 2018.

the District resolve through dismissal (42%),[35] a plea (30%),[36] or diversion (14%).[37] Misdemeanor bench trial rates have remained low, averaging 5% of all misdemeanor dispositions.[38] There is no reason to think that an expansion of the misdemeanor jury trial right would create a significant shift in these numbers beyond converting bench trials to jury trials.

Further undermining the judicial efficiency argument is the fact that the vast majority of states successfully provide full jury trial rights to their citizens. Thirty-five states currently provide the right to a jury trial in virtually all criminal prosecutions in the first instance.[39] Another three states require bench trials for some minor criminal offenses, but provide a jury trial right *de novo* on appeal, effectively guaranteeing a jury trial right in every case.[40] Another three states have developed systems that stop short of a full jury trial right, but are more expansive than the constitutional minimum.[41] Only nine other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[42]

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[35] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of misdemeanor dispositions at: 46% in 2003, 41% in 2004, 39% in 2005, 36% in 2006, 40% in 2007, 39% in 2008, 44% in 2009, 40% in 2010, 43% in 2011, 39% in 2012, 36% in 2013, 40% in 2014, 43% in 2015, 49% in 2016, 47% in 2017, and 51% in 2018.

[36] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor guilty pleas as a percentage of misdemeanor dispositions at: 21% in 2003, 23% in 2004, 26% in 2005, 41% in 2006, 36% in 2007, 34% in 2008, 31% in 2009, 36% in 2010, 32% in 2011, 29% in 2012, 31% in 2013, 30% in 2014, 28% in 2015, 27% in 2016, 28% in 2017, and 27% in 2018.

[37] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor diversion as a percentage of misdemeanor dispositions at: 8% in 2003, 9% in 2004, 5% in 2005, 10% in 2006, 11% in 2007, 14% in 2008, 15% in 2009, 14% in 2010, 17% in 2011, 23% in 2012, 25% in 2013, 21% in 2014, 20% in 2015, 18% in 2016, 18% in 2017, and 16% in 2018.

[38] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor bench trials as a percentage of misdemeanor dispositions at: 3% in 2003, 4% in 2004, 4% in 2005, 5% in 2006, 5% in 2007, 5% in 2008, 6% in 2009, 8% in 2010, 6% in 2011, 7% in 2012, 6% in 2013, 7% in 2014, 7% in 2015, 5% in 2016, 5% in 2017, and 5% in 2018.

[39] The following thirty-five states ensure the right to a jury trial in the first instance for virtually all criminal offenses: Alabama, Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details. Some states provide this right by judicial interpretation of state constitutional provisions while others have legislatively enacted it.

[40] Arkansas, North Carolina, and Virginia. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[41] Hawaii (adopting a three-part test to determine an offense's severity), New Mexico (providing a jury trial right for all offenses punishable by more than ninety days), and New York (providing a full jury trial right throughout the state, but only for offenses punishable by six months in New York City). See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[42] Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

Yet, even if the rationale of judicial efficiency or financial[43] cost still holds for the District today, for several reasons, it is not clear that these considerations should outweigh right to a jury of one's peers.

First, the right to a jury is a foundational right of the American legal system. It is one of the only rights enumerated in the original, unamended Constitution[44] and is given additional protection in the Sixth Amendment.[45] The constitutional language itself is unequivocal, ensuring the right to a jury trial for "all Crimes"[46] and in "all criminal prosecutions."[47] As many historians, legal scholars, and Supreme Court Justices have pointed out, the jury trial serves a score of critical democratic functions.[48] It ensures that community standards are represented in local courtrooms.[49]

Second, the Council itself, in considering legislation impacting the jury trial right in the District, has repeatedly discussed and considered numerous circumstances in which the jury serves a particularly important role in weighing the outcome of a case. This includes cases where civil liberties are at stake,[50] cases where subjectivity plays a large role in demarcating criminal conduct,[51] and cases where law enforcement officers'

[43] Considering that the 1994 reduction in jury-demandable offenses had no anticipated monetary impact, it is likewise unlikely that the reverse process, an expansion of jury-demandable offenses, would result in additional cost. Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4 (indicating no monetary savings as a result of the amendment).

[44] U.S. Const. art. III, § 2, cl. 1 (The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury).

[45] U.S. Const. amend. VI, cl. 1 (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed).

[46] U.S. Const. art. III, § 2, cl. 1.

[47] U.S. Const. amend. VI, cl. 1.

[48] *See*, *e.g.*, Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wisc. L. R. 133, 136-37 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).

[49] *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).

[50] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, —that is, allowing for a jury trial—is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones will permit law enforcement against otherwise permitted activity—freedom of association, for instance—and thus the bill permits trial by jury.").

[51] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt."); Committee on the Judiciary Report on Bill 18-151, the "Omnibus Public Safety and Justice Amendment Act of 2009," at 33 ("A key change recommended by the Committee has to do ensuring a defendant's right to a jury trial. The primary factor in the Committee's decision to ensure this right relates to the subjective nature of stalking. It seems highly appropriate that a jury of peers would be best equipped to judge whether the behavior is acceptable or outside the norm and indicative of escalating problems. As stated by PDS, '[s]talking is an offense for which the community, not a single judge, should sit in judgment. Community norms should inform decisions about whether behavior is criminal or excusable.'").

credibility is at issue.[52] While these Council statements have been made in the context of specific offenses, these rationales apply much more broadly across misdemeanors.[53]

Third, rights-based arguments aside, the limitations on jury demandability produce two main problems in specific cases.

First, the existence of a divide between jury-demandable and non-jury demandable cases in which the former require greater prosecutorial and judicial resources than the latter distorts charging practices by incentivizing the prosecution of lower charges that do not fully account for the facts of a case. Prosecutors enjoy wide discretion in charging decisions and the overlap between the scope of conduct covered by particular offenses (to a lesser degree under the RCC than the current D.C. Code) gives prosecutors multiple options as to which crimes to charge in a given case. If a prosecutor wishes to avoid a jury trial for any reason—and to the extent that added time is required for a jury trial or a conviction is less likely,[54] a prosecutor may be incentivized to do so—he or she often can simply opt to charge a non-jury demandable offense. The extent to which prosecutors make their charging decisions based on whether the crime is jury demandable is difficult to measure because charging discretion may be based on so many different reasons and there is no record as to the reason for choosing one charge over another.[55] However, there are two examples that indicate the impact of this practice.

One example of how restriction of jury demandability distorts charging is the use of attempt charges to avoid jury trials in threat cases. D.C. Code § 22-407 criminalizes

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[52] *See* Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17 (emphasizing the importance of the jury in moderating prosecutorial charging decisions and the importance of removing the judge from having to make officer credibility findings as support for making assault on police officer offenses jury demandable).

[53] For example, for a charge of current D.C. Code § 22–1307, Crowding, obstructing, or incommoding (a 90 day offense) or other misdemeanor public order offenses the complainant of record and sole witness may be a law enforcement officer. Arguably, as with assault on a police officer, the same rationale of removing the judge from having to make officer credibility findings in a case would support making this offense jury demandable.

[54] Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("But while the Council's goal may have been efficiency, the effect on imprisonment rates was immediate and monumental. At the time, according to a report by the Court's executive officer, Superior Court judges were almost twice as likely as a jury to decide that someone was guilty—so reducing jury trials made the conviction rate skyrocket. For misdemeanors, the year prior to the MSA, only 46 percent of cases ended with a guilty verdict or a guilty plea. The year after, that number jumped to 64 percent. This wasn't exactly an unexpected consequence. Several councilmembers were sure to clarify that despite reducing criminal penalties, the MSA was tough on crime. Even though the maximum sentence for most of these crimes used to be one year, the actual sentence was already generally less than 180 days. Thus, explained Harold Brazil—then-Ward 6 councilmember and one of the Act's co-sponsors—the MSA would mean 'misdemeanants would actually do more time.' 'Crime in our society…[is] out of control,' Brazil argued at a Council hearing on April 12, 1994. 'Years and years of leniency and looking the other way and letting the criminal go has gotten us into this predicament.'").

[55] *But, see* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Reviewing more than 500 cases from 2019, City Paper found that over the course of one month, prosecutors dodged jury trials more than 24 times a week by taking a crime that is jury-demandable and charging it as another, counterintuitive crime that's not.").

threats to do bodily harm.[56] Because the authorized maximum penalty for threats to do bodily harm is six months, a criminal defendant charged with the offense is entitled to a jury trial.[57] The District's attempt statute, however, has a maximum authorized penalty of 180 days for non-crime of violence offenses, making an attempted threat to do bodily harm non-jury demandable.[58] Although it is legally possible to attempt a threat without actually completing a threat, the likelihood of this factual scenario both occurring and resulting in prosecution is exceedingly low.[59] Nonetheless, of the 6,556 charges brought under D.C. Code § 22-407 between 2009 and 2018, 56% were for attempted threats rather than completed threats.[60] As there is no practical difference in the authorized imprisonment penalty between the attempt and completed offense (the difference between 6 months and 180 days), such a high percentage of charges for attempted threats of bodily injury suggests charging decisions may be based on jury demandability rather than how the facts fit the law.

Another example of example of how restriction of jury demandability distorts charging is evidenced by the shift in the number of charges brought under D.C. Code § 22-405(b)—assault on a police officer (APO)—before and after the offense became jury demandable. In 2016, the D.C. Council passed the Neighborhood Engagement Achieves Results (NEAR) Act, which split the existing 180 day, non-jury demandable APO offense into a new APO offense and a resisting arrest offenses and increased the penalty for both to six months.[61] The apparent legislative purpose of this shift was to make sure that these offenses were decided by juries rather than judges.[62] But charging data suggests that this has not been the effect of the law. The number of charges for violations of D.C. Code § 22-405(b) remained relatively consistent within the range of 1,592 and 1,712 for every two-year period between 2009 and 2016.[63] However, after the NEAR Act, for the period

[56] D.C. Code § 22-407 ("Whoever is convicted in the District of threats to do bodily harm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year.").

[57] D.C. Code § 22-407; D.C. Code § 16-705.

[58] D.C. Code § 22-1803; D.C. Code § 16-705.

[59] *See Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001) (holding that "if a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense" but recognizing that "[a]s a practical matter, such unconsummated threats may be unprovable").

[60] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Also, of the 1,869 convictions under D.C. Code § 22-407 between 2009 and 2018, 72% were for attempted threats rather than completed threats. *Id.*

[61] Neighborhood Engagement Achieves Results Amendment Act of 2016 (effective June 30, 2016), D.C. Law 21-125.

[62] *See* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Ward 5 Councilmember Kenyan McDuffie, who wrote the NEAR Act, tells City Paper that the goal was the make the crime jury-demandable."); Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17.

[63] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Specifically, the numbers were: 1,712 in 2009-2010, 1,592 in 2011-2012, 1,659 in 2013-2014, 1,697 in 2015-2016. *Id.*

of 2017 to 2018, the combined number of charges for APO[64] and resisting arrest[65] dropped by about a thousand charges to a mere 529[66] This represents a more than 66% decrease in charging from the previous years. However, the number of charges brought for violations of D.C. Code § 22-404(a)—simple assault—saw a corresponding uptick with the passage of the NEAR Act. For two-year periods between 2009 and 2016 simple assault charges were in the range of 3,221 to 3,865, but rose about a thousand charges to 5,282 for the period of 2017 to 2018.[67] The elements of the simple assault offense are identical to the prior APO offense, except that the complainant's status as a law enforcement officer need not be proven. And the NEAR Act did not explicitly preclude prosecutors from using their discretion to charge what previously had been an APO case as a simple assault. As there is no practical difference in the authorized imprisonment penalty between the revised offenses (revised APO and resisting arrest) and simple assault (the difference between 6 months and 180 days), the shift in charges so simple assault suggests these charging decisions may be based on jury demandability rather than how the facts fit the law.

The second main problem caused by the limitation of the right to a jury is that the maximum term of imprisonment is sometimes an inaccurate proxy for the real seriousness of a criminal charge to a particular person. Some offenses carry severe consequences for those charged despite having relatively low terms of incarceration yet are not afforded a jury trial.

One example of how an imprisonment penalty misrepresents the seriousness of a criminal charge is D.C. Code § 22-3010.01—misdemeanor sexual abuse of a child or minor—a 180-day offense that currently is not entitled to a jury trial.[68] But the offense is a "registration offense" under D.C. Code § 22-4001(8)(A).[69] Because of this, a person convicted of misdemeanor sexual abuse of a child or minor is subject to mandatory sex offender reporting requirements for ten years following their conviction or release.[70] The collateral consequences of sex offender registration—including burdensome restrictions on residency, internet usage, and access to public housing have been extensively documented.[71] The long-term and public nature of reporting requirements, the increased exposure to criminal liability for failures to report, and the additional social and structural

[64] The 2017-2018 charges for the unrevised and revised APO, D.C. Code § 22-405, were 355, with 80 convictions (a 23% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[65] The 2017-2018 charges for D.C. Code § 22-405.01 were 174, with 25 convictions (a 14% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[66] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[67] The charges for D.C. Code § 22-404(a) were: 3,221 in 2009-2010, 3,506 in 2011-2012, 3,432 in 2013-2014, 3,865 in 2015-2016, and 5,282 in 2017-2018.

[68] D.C. Code § 22-3010.01. See also misdemeanor sexual abuse, D.C. Code § 22–3006, carrying a 180 day (non-jury demandable) maximum imprisonment penalty.

[69] D.C. Code § 22-4001(8)(A).

[70] D.C. Code § 22-4003.

[71] *See, e.g.*, Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531, 532-539 (2007); Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (September 2007).

consequences that accompany sex offender registration indicate that the seriousness of a misdemeanor sexual abuse or other charge involving sex offender registration may warrant elevated due process rights as a matter of policy.[72]

A second example of how imprisonment penalties do not accurately represent the seriousness of a criminal charge is when that charge could result in deportation. In 2018, an *en banc* decision of the D.C. Court of Appeals in *Bado v. United States* first held that a criminal defendant is entitled to a jury trial under the United States Constitution if charged with an offense that could result in deportation.[73] Although this decision addressed the fundamental issue of severe consequences resulting from juryless convictions, it has also produced its own set of challenges. As Senior Judge Washington noted in his concurring opinion, the court's decision created an odd dichotomy in which non-citizens are now entitled to more due process in the District's Superior Court than citizens for the exact same offense.[74] While the *Bado* decision extends jury demandability to relevant crimes for non-citizens, these non-citizens are in the difficult position of having to reveal their immigration status in open court in order to claim a constitutional right.[75]

The partial restoration of a jury right may have significant benefits to public safety insofar as this change in District law helps to restore community support for the criminal justice system.[76] In his concurring opinion to the *Bado* decision, Judge Washington urged the D.C. Council to adopt a full jury trial right and stating:

> Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial.[77]

However, the revised statute does not address all rights-based and other problems with restriction of jury-demandability. As long as the right to a jury trial is restricted for

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[72] The DCCA has previously held that, as a matter of law, a right to a jury does not exist for a charge of misdemeanor child sexual abuse under current law. *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008).

[73] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury.")

[74] *Bado v. United States*, 186 A.3d 1243, 1262 (D.C. 2018) (en banc) ("I write separately because I am concerned that our decision today, while faithful to the dictates of *Blanton*, creates a disparity between the jury trial rights of citizens and noncitizens that lay persons might not readily understand. That disparity is one that the legislature could, and in my opinion, should address. The failure to do so could undermine the public's trust and confidence in our courts to resolve criminal cases fairly.").

[75] This point previously has been raised the Public Defender Service for the District of Columbia, a CCRC Advisory Group Member. *See* CCRC Comments on First Draft of Report #41 Ordinal Ranking of Maximum Imprisonment Penalties, 2 (November 15, 2019).

[76] Tom R. Tyler et al., The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement, *Psychological Science in the Public Interest*, 16, 75-109. (Available at http://dx.doi.org/10.1177/1529100615617791.)

[77] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (en banc).

some charges and the prosecution of those charges require fewer resources or are more likely to result in a conviction, there will continue to be incentives to base charging decisions on jury demandability rather than what charge best fits the facts of the case at hand. In addition, as noted above, the revised statute's codification of the *Bado* holding requires non-citizen defendants to disclose their citizenship status in court in order to avail themselves of jury demandability. Finally, there may be significant judicial efficiency costs that arise from litigation over the right to a jury for specific charges and individual defendants—efficiency costs that would not exist if the District followed the majority of states in extending a right to a jury in every criminal case carrying an imprisonment penalty.

The revised statute is a compromise solution to restore jury demandability that mitigates the potential impact on judicial efficiency. The revised statute, however, should not be construed as a permanent judgment as to the appropriate balance between judicial efficiency and the right to a jury of one's peers. A future expansion of jury-demandability to all criminal offenses may be feasible and warranted in the near future.