

# M11 / Modified Short Split Issue Paper

## INTRODUCTION

The COVID-19 pandemic significantly impacted the District of Columbia’s criminal justice system and the Superior Court of the District of Columbia’s (Superior Court) operations. In the early spring of 2020, the courthouse closed for almost all proceedings. Once the Superior Court re-opened to the public, hearings remained limited.<sup>1</sup> As a result, the amount of time individuals spent waiting to have their criminal case resolved increased dramatically. For those individuals who were incarcerated, it meant spending additional time confined prior to their case’s disposition or sentencing date.

Due to the delays in Superior Court operations, in 2021, the Commission made two substantive changes to the Guidelines to ensure defendants were not harmed because of court delays or other pandemic related issues outside of their control. Prior to the onset of the pandemic, a defendant could only be sentenced to a Guidelines compliant short split sentence if the court imposed a sentence within the applicable prison range and suspended the execution of all but six months or less (but not all) of the sentence. Both changes allowed defendants who had served *more* than six months incarcerated prior to their sentencing to remain eligible for a short-split sentence. To accomplish this goal, the Commission added a new Mitigating Departure Factor, as well as a modification to the definition of a compliant short split sentence. The short split modification went into effect on June 25, 2021, while the new mitigating factor went into effect on July 23, 2021. Each change is discussed in more detail below.

### Change 1: Modified Definition of a Short Split Sentence

A short split sentence is one where the court imposes a prison sentence that falls within the prison range in the appropriate Guidelines box, suspends execution of all but six months or less (but not all) of that sentence and imposes up to 5 years’ probation.

In response to the impact of the COVID-19 pandemic on sentencing timelines and Superior Court procedures, the Commission modified the definition of a compliant short split sentence whenever the court faces delays “in connection with the invocation of D.C. Code § 11-947, or the circumstances that caused the invocation of Section 11-947.”<sup>2</sup> Under the modified rule, when § 11-947 is invoked, the court may impose a Guidelines compliant “short split” sentence when the defendant has already served more than six months incarceration prior to sentencing. This would otherwise be a non-compliant split sentence because the amount of time initially served by the defendant is greater than six months. However, under the modified rule, it is now possible to impose a Guidelines compliant short split sentence where the initial time served can be greater than six months incarceration.

### Change 2: New Mitigating Departure Factor

The Guidelines contain a non-exhaustive list of departure principles that, if cited, allow a judge to impose a sentence outside of the Guidelines recommendation. This list is comprised of eleven aggravating and

---

<sup>1</sup> There was a significant decrease in the number of counts, cases, and individuals sentenced in both 2020 and 2021 compared to previous years.

<sup>2</sup> D.C. Code § 11-947 is the statutory authority that permits the Chief Judge to toll or suspend proceedings in the Superior Court of the District of Columbia in connection with the invocation of an emergency order.

eleven mitigating factors that judges can use at their discretion to sentence outside of the applicable Grid box while still imposing a Guidelines-compliant sentence.<sup>3</sup>

The Commission approved a new Mitigating Departure Factor in response to the impact of the COVID-19 pandemic on sentencing procedures. The language of this new mitigating departure factor, commonly referred to as 'M11', is as follows:

*When there is a substantial and compelling basis, as articulated by the sentencing judge, a mitigated departure may be granted to reduce the defendant's applicable guideline sentence due to the invocation of D.C. Code § 11-947 or the circumstances that warranted the invocation of D.C. Code § 11-947.*

The modified short split definition and eligibility of the M11 mitigating factor apply equally to individuals impacted by delays or negative circumstances due to the invocation of D.C. Code § 11-947, regardless of whether their case was filed before, during, or after the statute's invocation, so long as the court finds a substantial and compelling basis to reduce the individual's sentence.

This issue paper aims to identify the utilization rate of both modifications to the Guidelines by examining sentences in which delays in sentencing and court proceedings may have occurred due to the invocation of D.C. Code § 11-947. The analysis evaluates how frequently the new additions to the Guidelines have been utilized by Superior Court judges and reviews any emerging trends among sentences where the modified short split and/or M11 Mitigating Factor were utilized. Note that the data contained in this report represents a small sample of cases, as the modifications to the Guidelines have been in effect for approximately one year. It is important to acknowledge that when there are a low number of observations, it is difficult to product meaningful analysis that can be generalized to the sentenced population given that any identified trends are from a limited sample of cases.

## **Modified Short Split Sentences**

### **DATA COLLECTION**

Determining which sentences were imposed utilizing the new short split rule was difficult because there is no unique data element that indicates a judge utilized the new rule. This section discusses the procedure and methodology used to identify cases where a short split sentence was imposed and was deemed compliant with the Guidelines under the modified short split definition. The research required a multi-tiered analytical approach. Sentences were included in the initial analysis based on the following criteria:

- The case was disposed of on, or after, June 25, 2021 (date that the short split modification went into effect); and
- The sentence imposed was greater than six months, and the judge suspended a portion of the sentence, where the resulting sentence (to serve) was *less than* the minimum of the Guidelines recommended sentence range, as defined by the appropriate Grid box; and
- The sentence was not based upon a Rule 11(c)(1)(C) plea agreement; and

---

<sup>3</sup> A complete list of Departure Factors can be found in Chapter 5 of the 2022 D.C. Voluntary Sentencing Guidelines Manual.

- The sentence was not a compliant probation sentence, i.e. a probation sentence imposed in a probation eligible box.

This sample of sentences was further narrowed by omitting any case where the amount of time between the date of arrest and date of sentence was *less than* 180 days because those sentences could receive a compliant short split sentence without the rule change. A summary of this information is presented in the table below.

	Counts	Cases	Individuals
Sentences Meeting Above Criteria	113	108	107
<i>Arrest to Sentence Less than 180 Days</i>	18% 20	17% 18	17% 18
<b><i>Arrest to Sentence 180 Days or More</i></b>	<b>82%</b> <b>93</b>	<b>83%</b> <b>90</b>	<b>83%</b> <b>89</b>

The remainder of this issue paper primarily focuses on the 90 cases (89 individuals, 93 counts) where the amount of time between arrest and sentence was greater than 180 days, given that these cases are ones in which any credited amount of time served could be greater than 6 months, thus potentially resulting in a compliant split sentence under the modified definition.

The docket entries for each of these 90 cases were manually reviewed in order to determine the number of days that each individual was detained prior to their sentencing date.<sup>4</sup> This calculated amount represents a **best estimate of time served** and is based on the date(s) in which a ‘*Commitment Pending Disposition*’, and/or a ‘*Release Order*’ were filed (among other various docket entries that indicate a person’s confinement/release). It is important to acknowledge that this manual calculation of time served is a notable data limitation as there is potential for data entry errors in the dockets, and/or discrepancies in the dates reported on the docket and when the confinement/release actually occurred. In order to compensate for any errors, the analysis includes cases where the amount of time served was determined to be 165 days or greater (just under 6 months), which provides a 15-day “cushion” to ensure that cases are not falsely omitted from the analysis in the event that the was subject to one of the above erroneous scenarios.

Of the 89 individuals where the time between their arrest and sentence was six months or greater, only 29% (26 individuals, belonging to 26 cases) spent approximately six months or more, detained prior to their sentence date. Sentencing trends for these 26 cases are reported below.

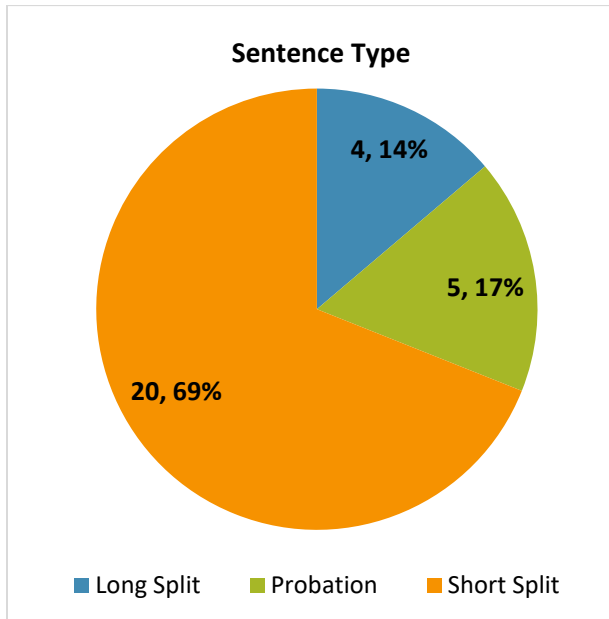
### SENTENCING TRENDS

Since the inception of the modified short split definition, there were 107 individuals whose sentence imposed was greater than 6 months, but the resulting sentence to serve (after time suspended) was less than the bottom of the recommended sentencing range. This subset of 107 individuals represents 12% of the sentenced population (868 individuals), whose cases were disposed on or after June 25, 2021, and were sentenced before June 17, 2022.<sup>5</sup>

<sup>4</sup> Note that only 87 of the 90 cases were able to be reviewed in JUSTIS. The remaining three cases were sealed and, therefore, could not be reviewed.

<sup>5</sup> The data for the analyses presented in this Issue Paper was retrieved on 6/17/2022.

Of these 107 individuals, 89 (representing 83%) had at least 6 months between their day of arrest and day of sentencing, though only 24% (26 individuals) were detained for 6 months, or more, while their case was pending disposition. These 26 individuals were convicted in a total of 29 counts; the distribution of sentence type for these counts is displayed below.



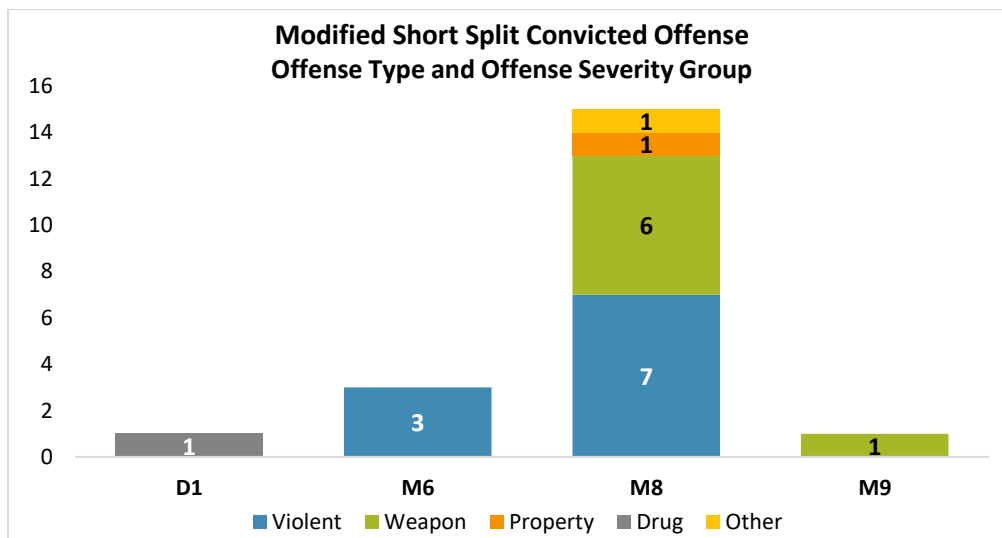
Of the 29 counts, 69% received a short split sentence, as indicated by the orange shaded slice.

Prior to the implementation of the modified short split sentence, when accounting for time served, these 20 counts would have been deemed 'non-compliant split sentences' given that the total time incarcerated would be greater than 6 months, but less than the bottom of the Guidelines recommended sentencing range. However, under the modified definition, they are now Guidelines compliant.

**Therefore, the modified definition of a short split sentence was utilized in 20 cases since its implementation to the Guidelines in June 2021.**

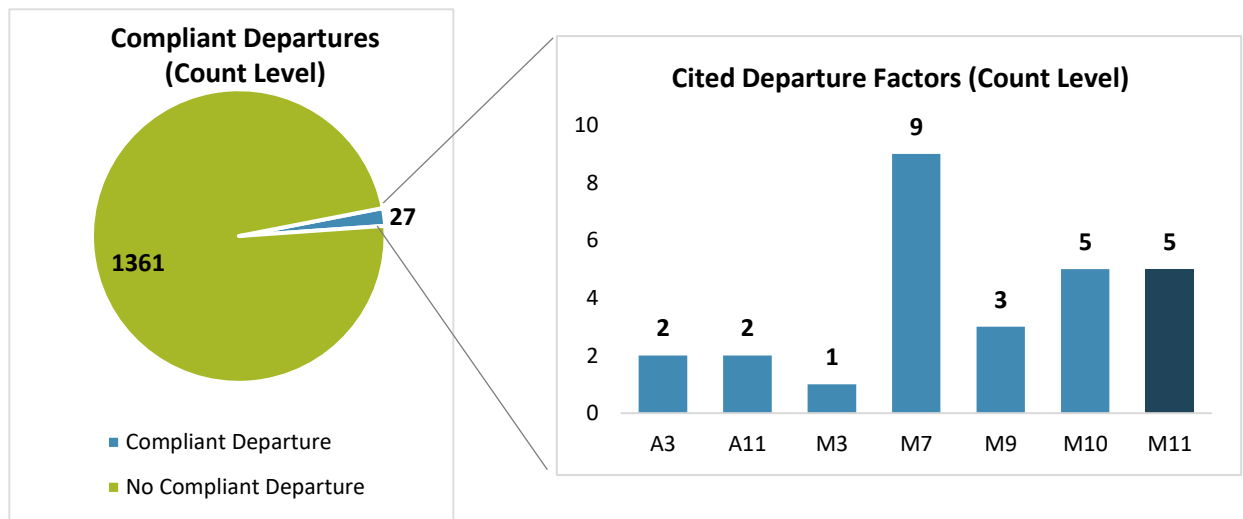
Modified short split sentences were most commonly imposed following convictions for low level, Violent or Weapon offenses. As illustrated in the table below, the majority (15 counts, 75%) of modified short split sentences were imposed for offenses ranked in offense severity group M8 and with 80% of all counts were in severity groups M8 and M9 on the Master Grid.

Half of all modified split sentences (10 counts, 50%) were imposed for Violent offenses. Weapon offenses represented 35% of all modified short split sentences, while Drug, Property, and Other each represented 5% (1 count each).



## M11 – Mitigating Departure Factor Sentences

Departure factors were cited in 2% (27) of the 1,338 felony counts that were sentenced between June 25, 2021 (date of M11 implementation) and June 17, 2022;<sup>6</sup> the M11 departure factor was cited in five counts, representing 18% of all 27 compliant departures, as depicted in the charts below. Since its implementation, the new M11 mitigating factor has been utilized in five counts in four individual cases (one case had two counts sentenced with a M11 departure).



Due to the limited amount of data available for M11 departures, no meaningful analysis can be performed at this time. However, the Commission will continue to monitor the sentencing trends for any counts that do receive this type of mitigating departure to understand if there are any patterns or commonalities amongst the type of cases or individuals that are receiving M11 departures.

The few notable trends are reported below. It is important to remember that these findings cannot be generalized as M11 departures represent less than 0.5% of all felony counts sentenced in the 12-month timeframe after its implementation.

- Two of the five counts that received an M11 departure were for Burglary II, and one was for attempted Burglary II. These three counts each fell in a “prison or long split only” recommended Guidelines grid box,<sup>7,8</sup>
- One count was given a probation sentence in a “prison or long split only” box for Attempt to Commit Robbery
- One count was given a prison sentence for Unlawful Possession of a Firearm in a “prison or long split only” box, however the sentence imposed was below the Guidelines recommended range.

<sup>6</sup> The data for the analyses presented in this Issue Paper was retrieved on 6/17/2022.

<sup>7</sup> In a “prison or long split only” box, to comply with the Guidelines the judge must sentence the defendant to serve at least the bottom of the recommended sentencing range. Unless an exception applies or mitigating departure factor is used, if the amount of time to serve is less than the bottom of the box, the sentence is deemed non-compliant with the Guidelines.

<sup>8</sup> Utilization of the M11 departure principle is independent of the modified short split definition, any legal sentence (incarceration, long split, short split, or probation) can be imposed when citing M11.

- All four sentenced defendants had a criminal history score of C, or higher.

## **CONCLUSION**

In response to the COVID-19 pandemic, the Commission added a new mitigating departure factor and modified the definition of a short split sentence in the D.C. Voluntary Sentencing Guidelines. These adaptations allowed judges to impose an appropriate sentence, accounting for any continued complications or delays in sentencing caused by the invocation of D.C. Code § 11-947. This Issue Paper examined the trends and utilization rate of both changes throughout the first year since their implementation. During this timeframe, both the modified short split and the M11 departure factor were applied in very few cases (approximately 2%), therefore, any findings drawn from this analysis cannot be generalized due to the limited data available. Moving forward, the Commission will continue to monitor the sentencing trends and utilization rate of these amendments.

A list of key findings from this analysis is presented below:

- Of the 107 individuals contained in this analysis, the majority (89, 83%) had six months or more between the date of their arrest and date of sentencing. Conversely, only one-quarter (26 individuals, 24%) were detained for the at least 6 months while their case was processing.
- In the year following the implementation of the modified short split sentence, there were 20 counts, representing approximately 2% of all counts sentenced, that benefitted from the new definition.
- The new M11 departure factor was cited in less than 0.5% of all felony counts sentenced in the year since it was added to the D.C. Voluntary Sentencing Guidelines.
  - o However, M11 was one of the more frequently used departure factors in this timeframe, representing 18% (5 counts) of the 27 compliant departure sentences imposed.