

Government of the District of Columbia



Sentencing and Criminal Code Revision Commission

Testimony of
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FY 2011 Performance Oversight Hearing

Committee on the Judiciary
Phil Mendelson, Chair
Council of the District of Columbia

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Thank you, Mr. Chairman for providing me this opportunity to update you on the work of the Sentencing and Criminal Code Revision Commission and to present the agency's proposed budget for FY 2012. I will provide a brief overview of Commission's activities over the past year and outline the goals for 2012. In addition, the budgetary needs of the agency will be discussed as related to its two major projects, the Voluntary Sentencing Guidelines and the Criminal Code Revision Project for the District of Columbia.

The Commission has made significant progress since my last appearance before you. The agency has filled all vacant positions, with the exception of one position which became vacant in mid January 2011. Staff positions have been reclassified to more closely meet the skill sets required to undertake the current tasks and projects of the agency. Fiscal issues facing the agency last year have been resolved and new protocols for resource management have been developed and implemented. The agency has been very creative in exploring options to conserve limited District resources including acquiring office furniture and fixtures from Federal Surplus, discontinuing the use of all District paid phones and blackberry mobile devices and implementing a replacement schedule for agency computers and IT equipment.

Persistent issues impacting the electronic transfer of sentencing data from the DC Superior court have been resolved and an interim solution for accessing criminal history data provided by CSOSA has been identified. A new procedure for obtaining detailed information from judges concerning guidelines compliance has been implemented and response rates have increased significantly. The Commission has submitted to the Council its first legislative deliverable for the Criminal Code Revision Project, "The Fine Proportionality Act of 2011." Additional work on this project is ongoing.

Finally, the Commission has developed the first structural change to the Voluntary Sentencing Guidelines since their implementation in 2004. Guided by the goals of proportionality and consistency, changes to the design of the Drug Grid and the value of misdemeanor points in the calculation of criminal history have been proposed.

Although the Commission has experienced progress in several areas over the past year, the agency will still face a number of challenges in FY 2012. Those challenges include: maintaining electronic data transfer capabilities, verifying data quality and completion of the code revision project. Even with these challenges, the Commission intends to move forward in a positive manner with its mission and legislative mandate.

Voluntary Sentencing Guidelines

Over the past six years the Commission has monitored the implementation, usage and other aspects related to the guidelines since their implementation in 2004. As part of this monitoring process, review and analysis of sentences imposed under the guidelines is crucial for two primary reasons. The first reason is to determine if the guidelines are being applied in a consistent and appropriate manner, which is often referred to as "compliance." The second reason is to analyze the cases in which the guidelines are not followed to determine if any sections of the guidelines may need

adjusted or modified as the result of new legislation enacted, changes in sentencing patterns or Supreme or Appellate Court decisions.

Crucial to the ability to analyze and evaluate the guidelines is the need for valid, reliable, and timely sentencing data. Shortly after the implementation of the Voluntary Sentencing Guidelines, the Commission initiated a project to electronically transfer sentencing data from the DC Superior Court on a “real time” basis. The goal was to transfer data electronically from the court to the Commission via the Sentencing Guideline System (SGS) web application. This timely transfer of data directly from the court would enable the Commission to monitor sentences imposed, measure compliance and analyze sentencing trends.

I. Sentencing Data

The SGS is an independent, internet technology-based system. Access to the web-based application has been provided through the secure, private DC JUSTIS Agency database. Sentencing data flows from the Superior Court’s Courtview System to the DC SGS environment via the JUSTIS database when one of the following occurs: (1) a felony conviction occurs or (2) a sentence is imposed. This process has been successfully tested and the SGS application and web service installed on production servers in the District of Columbia. Over the past couple of years modifications have been made to the SGS application to allow the Commission to perform specific types of updates such as adding new offenses or new judges that will minimize the ongoing software maintenance costs to the agency.

Once the development of the SGS web application was completed, the agency struggled for a number of years trying to address the numerous issues that impacted data transfer capabilities, including schema compatibility, data mapping, and applying business rules. However, with the assistance of CJCC, the data transfer was completed this year. Sentencing data for all felony sentences imposed since January 16, 2006, to the present were transferred. Upon the completion of the historic data transfer, a daily feed was implemented that transfers daily all felony dispositions and sentences imposed for that specific day. The Commission now has access to complete and timely sentencing data for monitoring, analysis and research purposes.

This data serves two primary purposes. First, the data is imported into the agency database where analysis and monitoring of the sentences occur. This data is also used to develop the agency’s Issue Papers which are released quarterly. Secondly, the data is imported into the web application which calculates the recommended guidelines sentence and compares it with the sentences imposed for compliance purposes. This is a significant accomplishment for the Commission since now multiple years of sentencing data are available for analysis and a comprehensive evaluation of the guidelines will begin. This can assist the Commission in developing recommendations to improve the effectiveness of the guidelines. This analysis is one of the most important tasks of a sentencing commission since new concerns evolve continually and the composition of the Commission provides the expertise and objectivity that is the basis of developing evidence based sentencing policy.

II. Compliance Data

Although the electronic transfer of sentencing data was a very significant accomplishment of the Commission during the past year, progress has also been made in other data related areas. The Commission annually measures judicial compliance with the guidelines, which has remained consistently high. However, data available on reasons for the imposition of non-compliant sentences has been limited. It is important to capture and analyze this specific data to determine whether portions of the guidelines may need adjustment. The Commission implemented a new procedure to obtain this data from judges this year. A revised, streamlined compliance survey was developed that can be completed by judges online to obtain information regarding a non-compliant sentence. The surveys are distributed and received using email which has increased both the timeliness and response rate for requests for compliance information. Interestingly, as a result of implementing this new procedure, compliance rates have actually increased since many of the sentences that initially appeared to be non-compliant are compliant once additional information is provided by the sentencing judge.

III. Criminal History Data

The Commission continues to work with the Court Services and Offender Supervision Agency (CSOSA) to explore potential options to allow the electronic transfer of criminal history information to the Commission. CSOSA data is merged with the Court's sentencing data to facilitate the calculation of guidelines sentences, sentencing trend analysis, and other numerous data analyses. Currently, the Commission is entering criminal history manually into the agency database and the SGS web application to provide the data elements required to measure guidelines compliance and calculate the appropriate guidelines sentence. This process is less than ideal and very time consuming, as well as prone to potential data entry errors. To fully utilize the capabilities and benefits of the SGS web-based application, it is necessary to incorporate criminal history information via an electronic means.

The Commission and CSOSA have met regularly over the past year to address this issue but funding priorities within CSOSA have limited developing a long term solution to this problem. In the interim, the Commission has developed an electronic Sentencing Guidelines Form using a Microsoft program called InfoPath which will replace the current Microsoft Word document form that is currently being used by CSOSA to record criminal history information. Among the benefits of the new electronic form is the standardization of data provided, automatic calculation of the criminal history score (thus reducing math errors), and the ability to electronically merge form data with cases in both the SGS web application and the agency database. Although the new form will replace the need for manual data entry, reduce errors, and improve the validity of the data, it still does not provide the direct transfer of criminal history information, which is what is needed to get optimal use of the SGS web application. The Commission will continue to work with CSOSA to find a long term solution to this problem.

IV. Changes to the Sentencing Guidelines

During its September 2010 meeting, the Commission ranked Possession of Liquid PCP in Drug Group 3 given that it was the lowest level on the Drug Grid available to rank this new offense. However, during the Commission's discussion, it was noted that this was a very unique offense because it was the only drug possession offense classified as a felony and perhaps a fourth group needed to be added to the Drug Grid to accommodate the Attempt Possession of Liquid PCP. In addition, the Commission considered that the re-ranking of drug offenses with different statutory maxima may be appropriate to promote sentencing proportionality. Currently, drug offenses with 3 and 30 year maximum penalties are all ranked in the same drug offense group.

Given the Commission's statutory directive to "[p]romulgate, implement, and revise a system of voluntary sentencing guidelines for use in the Superior Court of the District of Columbia designed to achieve the goals of certainty, consistency, and adequacy of punishment...." D.C. Code § 3-101, the Commission decided to modify the structure of the Drug Grid. There was some reorganization of drug offenses, primarily based on the statutory maximum, to reflect proportionality and consistency in sentencing. The Commission also voted to add a fourth drug group that would contain attempts and conspiracies for offenses in Drug Group 3. In addition, some slight modifications were made to the sentencing disposition options within the various grid cells

Another change proposed by the Commission focused on the point values for prior misdemeanor convictions in the calculation of criminal history. Previously, only convictions of misdemeanor offenses prosecuted by the U.S. Attorney's Office were being counted in calculating criminal history under the District's Voluntary Sentencing Guidelines with a few exceptions for misdemeanors prosecuted by the Office of the Attorney General. The Commission determined that a number of serious misdemeanor offenses prosecuted by the Office of the Attorney General, such as Driving Under the Influence, Reckless Driving, and Public Assistance Fraud, should also be considered in calculating a defendant's criminal history. It was determined that convictions for misdemeanors with a penalty of 90 days or more would be scored at $\frac{1}{4}$ point with a maximum of one point total for prior misdemeanor convictions.

These proposed changes to the sentencing guidelines represent the first structural changes by the Commission since their implementation. These modifications also reflect the need for monitoring and reviewing the guidelines on an ongoing basis to ensure that the underlying principles used to develop the guidelines remain intact.

Although the Commission made significant progress in improving data quality and addressing unwarranted disparity in sentencing, there is still more work ahead for the Commission. With sufficient sentencing data now available, the Commission will complete an in-depth analysis in the coming year to identify the specific impact the guidelines has had on issues of disparity, proportionality and consistency in sentences imposed. The Commission wishes to express its thanks to the Chairman for supporting the Voluntary Sentencing Guidelines and ongoing work of the Commission to ensure fair, just and equitable sentencing policy in the District of Columbia

District of Columbia Criminal Code Revision Project

In addition to the Commission's responsibility to monitor the Sentencing Guidelines and promote fair and consistent sentencing policies, the Council has directed the Commission to prepare comprehensive recommendations for reform to the District of Columbia Criminal Code.

Criminal code revision is a very complicated and challenging project that requires a significant investment of time and resources. Acknowledging the importance and complexity of this project, the "Omnibus Public Safety and Justice Amendment Act of 2009" revised the Commission's deadline for the completion of this project from September 30, 2010, to September 30, 2012. The Commission's final recommendations will assist the Council in providing clarity and consistency of criminal laws and serve the public safety needs of the District of Columbia.

Despite severe limitations in personnel designated to this project, the Commission has made progress on the project and presented the first deliverable to the Council in January 2011 entitled "The Fine Proportionality Act of 2011." This Act standardizes fines for all felonies and most misdemeanor offenses within the District of Columbia. This initial recommendation addresses the inconsistency in fine amounts currently found in the DC Criminal Code and recommends fine amounts proportional to the penalty for a specific offense.

Over the next 18 months, the Commission intends to submit a number of discreet code revisions that focus on improving the clarity, consistency and structure of the current criminal code. Among the areas targeted for code revision are the Theft and White Collar Crime Act of 1982 and related offenses, assaults and homicide, and Enactment of Title 22. In addition, revision activities will focus on the identification of unconstitutional statutes and common law offenses that could be codified. Finally, a general code clean-up will be undertaken to standardize format, style and language used throughout the code to provide clarity and reduce areas of confusion or ambiguity present in the current code.

The Commission had initially intended on undertaking a much more comprehensive code revision approach which included adopting a modified version of the Model Penal Code and examining penalty proportionality. However, with only a part-time attorney assigned to this project, it became apparent that completing a task of this magnitude by the project deadline simply is not possible. Even with the use of interns, the development of a criminal code database, creating a Criminal Code Revision Committee of the Commission and the partial use of the agency staff attorney's time, one part-time, experienced attorney heading this project is not sufficient to undertake this form of comprehensive revision to the District's criminal code.

In order to continue with the Criminal Code Revision Project and develop meaningful code revision recommendations, the agency has converted a clerical position to a paralegal specialist position that would be assigned full time to assist with the code revision project. With a full time paralegal, a part-time project director and the use of interns, the discrete criminal code reforms outlined above can be complete by the project end date of September 30, 2012.

However, the more critical staffing issue associated with the Criminal Code Revision Project is that funding for the part-time project director, Kenneth Cowgill, is not included in the agency's 2012

budget. Currently, Mr. Cowgill is classified as a term employee with a “not to exceed” date of September 30, 2011 – even though the project deadline is September 30, 2012. His current salary is \$77,500, a very reasonable salary for a retired U.S. Attorney with 32 years of experience and an in-depth knowledge of the DC Code. If funding for this position is not restored, the Criminal Code Revision project will come to a complete halt, since Mr. Cowgill’s knowledge and expertise is critical for guiding the work of both the paralegal specialist and interns required to complete this project. Given the forward movement on this project over the past year, it does not make good business sense to place this type of barrier to the completion of this project when significant accomplishments have been made to date. Although having Mr. Cowgill employed full time over the completion of the project would be ideal, and being mindful of the financial state of the District, reinstating this position at three quarter time or thirty hours per week would be sufficient to continue this project within the established deadline. The funding required for this 12 month term position would total \$77,500 with no benefits. No additional funding is required for the paralegal specialist position since those funds are included in the agency’s 2012 personnel budget.

Commission Budget Outlook

The Agency’s proposed budget for FY 2012 totaled \$768,471. The Executive Office of the Mayor (EOM) has proposed a further budget reduction for FY 2012 of \$77,187, which leaves the agency with a FY 2012 operating budget of \$691,284 and six FTE positions. However, that proposed budget amount does not include the funding for the project director position for the Criminal Code Revision Project in the amount of \$77,500 since that amount was not included in FY2012 budget figures. Thus, the Commission’s budget is actually decreased by a total of \$154,687.

The Commission has two funding priorities for FY2012 that are outlined below:

1. Funding for the agency’s SGS data system

The DC Superior Court is currently in the process of implementing a new mechanism, the Integrated Justice Information System (IJIS) broker, to transfer court related data to the JUSTIS database via the Criminal Justice Coordinating Council. Once this change is implemented, the court will retire the RAM server, which is the current source of the sentencing data used by the Commission. JUSTIS will become the communication hub for the court data instead of the RAM server. The new IJIS broker is anticipated to be completed towards the end of FY 2011. At that time, the Commission will need to develop connectivity to the JUSTIS System hosted by CJCC. This will involve designing and implementing a new schema and web service to transmit court data from JUSTIS to the Sentencing Commission. If this change is not made, the Commission will cease to receive sentencing data once the RAM server is discontinued and will be unable to meet its statutory obligations.

Given the difficulty the agency experienced in implementing the current schema, it is imperative that the resources necessary to make the required changes to the schema and SGS web application be available to ensure the continual transfer of sentencing data. Our current budget designates \$132,531 in contractual funds which will be used for this project. It is estimated that the schema

modifications could range between \$100,000 and \$150,000. In addition, the agency will need \$27,000 in contractual funds to pay for maintenance on the SGS application. At the current time the agency is not requesting additional funds to its proposed FY 2012 budget to complete this task. However, if the reductions to the agency proposed by EOM in the amount of \$77,187 are implemented, there will be insufficient resources available to fund these critical modifications

2. Funding for the Criminal Code Revision Project

The second priority area of funding is for the reinstatement of \$77,500 for the part-time project director for one year to complete the Criminal Code Revision Project. Given the progress the agency has made over the past year and the creation of a paralegal specialist position to assist full time with this project, it would not be cost effective or good policy to discontinue the project at this time, especially since it is close to completion.

I am requesting the Council restore the EOM proposed reduction of \$77,187 to the Commission's FY 2012 budget and provide funding for one part time, 12 month term position in the amount of \$77,500 to complete the Criminal Code Revision Project.

The Commission understands the difficult fiscal situation faced by the District and wants to ensure that funds are spent in a wise and frugal manner. We have been diligent in curbing agency expenditures over the past year and the agency is currently operating on a very tight budget. However, both the SGS web application and Criminal Code Revision project require a basic level of funding not reflected in the Mayor's proposed budget. Given the investment the Commission and the District has made in these projects, failure to complete them would not be cost beneficial nor provide for the public safety of the citizens of the District of Columbia.

As I mentioned earlier in my testimony, an effective sentencing guidelines system requires constant analysis and review. It is not a stagnant body of policy but rather one that evolves in response to new legislative mandates, changes in practice and new Supreme Court and appellate court decisions. The Commission is in a position to monitor, evaluate and recommend changes to sentencing policy based on valid data and evidence based practices to ensure the guidelines are operating in the most effective way possible in addition to providing for a Criminal Code that is clear, concise and understandable. Ensuring that the Commission has the tools to undertake these types of activities requires resources, which is why I am before you requesting that the \$154,687 be restored to the Commission's FY 2012 budget