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Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
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Dear Members of the Council of the District of Columbia:

I very much appreciate you inviting me to the Council Breakfast on December 6, 2023, and you continuing our conversation for more than twice the amount of time that you had allotted for the conversation. The primary point we wished to convey is that the criminal justice system that the District has constructed does not meet the crime crisis we face. There are gaps in the District's laws that are producing unintended results and there are important policy issues that are being delegated to various commissions. We stressed the importance of both providing these commissioners with more guidance and the need to consider who should have the Council's proxy on these commissions—as each of the commissions that we discussed has at least one commissioner appointed by the Council.

I write today to continue the conversation about sentencing outcomes under District law for our most violent offenses. As you know, we are troubled by the trendlines we are seeing for violent offenses and weapons offenses. We discussed the fact that many of these trendlines are driven by the District's Sentencing Guidelines, which are generated by the District's Sentencing Commission. I want to expand on the conversation we had and touch on an issue that very much impacts sentencing practices that was included in our slide deck for the Council Breakfast but which we did not have an opportunity to discuss—the Incarceration Reduction Amendment Act, which is more commonly known as the Second Look Act.

With respect to the Sentencing Guidelines, I previously explained that the Sentencing Commission reported in 2022 that 57 percent of those sentenced on our most commonly charged firearms offense—Carrying a Pistol Without a License—received a sentence of probation, and an additional 30 percent received a "short-split" sentence—a sentence that by definition can be no greater than six months in jail and is often a sentence of just a couple of days in jail. Of the roughly 13 percent who received a sentence of more than six months in jail, the majority were

also convicted of offenses where they actually *used* the firearm and were not solely convicted of possessing an illegal firearm. Here are some other statistics that the Sentencing Commission has provided related to sentences imposed in 2022 for *all* felony offenses:

- 27 percent of those convicted of a felony received a probationary sentence;
- 17 percent of those convicted of a felony received a short-split sentence, which is often not much more than a handful of days in jail;
- These sentences of probation and short splits mean that nearly half the people sentenced for *all felonies* in 2022 received little or no jail time; and
- Approximately 50 people received a sentence of 10 or more years.[1]

The last point bears repeating. In the same year where we saw 203 homicides, 158 sexual abuse offenses, 485 carjackings, 1387 assaults with dangerous weapons, and 2082 robberies, about 50 people *in total* received a sentence of 10 or more years. There very well may be jurisdictions whose current sentencing practices are leading to sentences that are greater than what is necessary to achieve the purposes of sentencing. The data makes clear that the District of Columbia is not such a jurisdiction. Instead, with the types of crime we see in our community, the only reasonable conclusion from this data is that in our most serious offenses, we are not seeing sentences that adequately reflect the harm these offenses cause to the community.

The primary driver of these inadequate sentences is the Sentencing Guidelines. These outcomes are a feature, not a bug, of the District's Guidelines, with the Sentencing Commission noting that 91.6 percent of felony sentences imposed in 2022 were consistent with the Sentencing Guidelines' proposed ranges of acceptable sentences. With the outcomes described above, there is little doubt that the District's Sentencing Guidelines power a revolving door for those arrested and prosecuted in this jurisdiction.

The fundamental problem fueling this trend is that the Sentencing Guidelines provide massive amounts of discretion to sentencing judges, leaving probation and short-split sentences as options in many sentencings. The dynamic is exacerbated by the fact that, unlike the Federal Sentencing Guidelines, there is not a transparent method for giving a defendant credit for accepting responsibility—a critical element of every sentencing regime. Instead, the logic of the Guidelines is that defendants should get credit by being permitted to plead to lesser charges. While the practical impact of these reductions can be relatively modest—given the broad discretion judges are granted under the Sentencing Guidelines—this bargaining can understate the crime committed on a defendant's record. We stressed at our meeting on December 6 that, if the D.C. Council wanted to stop this revolving door, it would have to name a commissioner who was inclined to do so and communicate to that commissioner that the D.C. Council wanted to reverse the trends that have brought us where we are.

On December 20, 2023, the D.C. Council held a roundtable to consider its nominee to the Sentencing Commission and will likely vote on the nomination early this year. As you are aware, the person that the D.C. Council is poised to have speak for it on matters of sentencing in

[1] This figure was derived from the D.C. Sentencing Commission's publicly available sentencing data.

felony cases was paroled in November 2021 after serving a 27-year sentence for First Degree Murder while Armed in the District. During the latter part of his sentence, the nominee spent nearly ten years pursuing an unsuccessful legal claim of actual innocence before later admitting he did, in fact, commit the murder and asking to be released early. Specifically, in 2014, a D.C. Superior Court judge concluded that the nominee's testimony under oath in support of his actual innocence claim was not credible, and when he appealed that decision, the D.C. Court of Appeals ruled that it had no basis to question this finding. *See* https://www.dccourts.gov/sites/default/files/pdf-opinions/15-CO-36.pdf. After this failed attempt, the nominee sought a sentence reduction under the Second Look Act. While the overwhelming majority of defendants are granted early release under the Second Look Act, the nominee's petition was among the small percentage that was denied. In denying his petition in 2021, a D.C. Superior Court judge ruled that the interests of justice did not support the early release of the nominee, given (among other things) the nominee's "deliberate, and recent, choices." The Court was "highly troubled by a specific characteristic that has been displayed consistently throughout his post-conviction history that seems at odds with any claim to integrity": his "deliberate dishonesty in his dealings with the Court" and "his willingness to commit actual perjury repeatedly, including as recently as in 2014."[2] *See United States v. Joel Caston,* 1994 FEL 911733, November 15, 2021 Order.

The nominee's story of transformation is prominently featured on the website of an advocacy organization that is focused on, among other things, decarceration. *See* https://www.sentencingproject.org/experiences/joel-caston/. In 2022, in the midst of about 50 people receiving a sentence of ten years or more, a staff member of this advocacy organization wrote an op-ed with the opening line: "D.C. officials are staring down a stark reality: Our criminal justice system is a mass incarceration mess." *See* https://www.washingtonpost.com/opinions/2022/10/18/district-criminal-justice-much-needed-reform/. The author of that op-ed is already a commissioner on the District's Sentencing Commission. We expect that the nominee would presumably second the view that the practices described above—where nearly half those sentenced of felonies receive little or no periods of incarceration—"is a mass incarceration mess."

While we recognize the nominee's work while incarcerated—including his election as an ANC Commissioner while incarcerated at the D.C. Jail and being a voice on behalf of other incarcerated people in a jail—neither that work nor his lived experience as an incarcerated person renders him an expert in sentencing policy matters.

The current situation only strengthens the case that we need to add to the voices on the Sentencing Commission. No one can be surprised that our system is producing its current outcomes when we are on the verge of having two voices affiliated with the same non-profit that

[2] The Judge specifically highlighted that the defendant "convinced several people to lie on his behalf," "made a calculated choice" in 2014, at age 37, to testify falsely under oath and blame the murder "on a now-deceased man." The court further described: "The defendant not only perjured himself in open court under oath, and suborned the perjury of two additional witnesses at the 2014 evidentiary hearing, he pursued his motion through not only a ruling and an appeal, but through a second ruling and second appeal, acknowledging his guilt only after his potential release on grounds of innocence was finally foreclosed by the Court of Appeals in 2021."

is working to reduce incarceration but no representatives from the Metropolitan Police Department or any other police body. The officers of the Metropolitan Police Department have a front-row seat to the revolving door, and they very much have a view that is not currently reflected on the Commission.

Outside of the District's Sentencing Guidelines, nothing has put more downward pressure on the sentences imposed for our most serious crimes than the Second Look Act. The idea that courts should, after a substantial period of time has been served, take a second look at the sentence imposed many years ago to ensure that the sentence is still appropriate is a laudable one. The idea particularly makes sense for sentences imposed decades ago when sentencing practices were substantially more stringent than current practices. As currently enacted, however, the Second Look Act goes well beyond what is needed to give courts an opportunity to revisit a sentence.

Simply put, the Second Look Act has created a perception that there is a 15-year *maximum* for any crime in the District for anyone who was under 25 at the time of the offense—which, of course, represents a substantial portion of the people charged with our most serious offenses. This perception that there is a 15-year maximum has groundings in reality. To date, roughly 80 percent of incarcerated individuals whose motions have been decided under the Second Look Act have gotten some relief. The fact that four out of five incarcerated individuals whose motions have been decided have received some type of sentencing reduction is not surprising given the way the law is written. Currently, the courts are constrained in the ways in which they can consider the facts of the crime that led to the convictions, and most of the analysis focuses on the person's disciplinary and educational record while incarcerated. With the rules crafted as such, it is clear why this perception exists that if incarcerated individuals do reasonably well while incarcerated, their sentences will later be reduced.

Let me provide one example of how this dynamic plays out in our most serious cases. In July 2018, armed gunmen went to the courtyard of an apartment building and indiscriminately began firing. The hail of gunfire tragically left a 10-year-old-child, Makiyah Wilson, dead and left four others seriously injured. Our Office and the Metropolitan Police Department spent years investigating the matter, and after a trial that lasted more than three months, convicted six men in connection with this callous and brazen shooting. Each of these men were under 25 at the time of this premeditated and cold-blooded rampage.

Because these men were detained for some period of time pending trial—and that time is credited towards their sentences—for most of them, in about 13 years or so, they will file motions seeking to have their sentences reduced to time-served. Having already fought hard to get them convicted and to defend the conviction on appeal, we will, once again, have to fight hard—this time to make sure they actually serve the sentences imposed for their heinous crimes against the young girl they killed and the four additional victims they tried to kill. The fight will be harder than it should be, as the District's law states that the court is not even required to consider the murder that led to their conviction and incarceration. Further, the law discourages courts from considering the brutality, cold-blooded and long-planned nature of the crime in assessing whether their commission of the crime was motivated by immaturity, impetuosity, and

failure to appreciate risks and consequences. Instead, the fight will likely focus on how they have done while incarcerated. This focus on behavior while incarcerated is particularly odd because most would agree that how one performs while incarcerated is not predictive of what will happen when released. Indeed, just last month, a jury in federal court found an individual guilty of multiple felonies committed less than one year after getting released from prison under the Second Look Act after serving a total of 26 years for 3 separate murder convictions. *See* https://www.justice.gov/usao-dc/pr/district-man-convicted-federal-jury-unlawful-possession-firearm-and-unlawful-possession.

Significantly, we are *not* asking the Council to eliminate the Second Look Act. Instead, we seek common-sense reforms to make the analysis more balanced. In addition to allowing courts to fully factor in the nature of offense to adequately account for aggravating factors, such as cold-blooded crimes or crimes involving multiple victims, the Second Look Act should make clear that incarcerated individuals cannot get credit for time served in other jurisdictions. It is a sad reality that a number of our defendants have been convicted of violent offenses, including murder, in multiple jurisdictions. The current law creates a question of whether someone who served time in connection with a Maryland conviction can move for relief under the Second Look Act *before* they serve 15 years in connection with the District of Columbia conviction, arguing they should get credit for the time served in Maryland. Similarly, the Second Look Act should expressly limit resentencing such that a judge cannot reduce the term of imprisonment to a term that is less than the term of imprisonment the defendant has already served. We have seen instances of defendants arguing, and some judges granting, reductions below the amount of time already served as a way of effectively reducing another sentence that defendant has yet to serve for either a federal conviction or a conviction in another state. Finally, the Second Look Act should make clear that it does not provide a basis for early termination of supervised release or probation when the person is no longer incarcerated. As our conviction in federal court last week makes clear, the system should be particularly diligent with supervising those who have served lengthy sentences to do all that can be done to have a successful reentry.

We very much appreciate your attention to these issues and stand ready to answer any questions you might have as you consider these critical nominations and much needed changes to our criminal justice system.

Sincerely,

Matt Graves

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